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EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

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HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 2223

EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

APRIL 30, 1985

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EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

TUESDAY, APRIL 30, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:10 p.m., in room 2226, Rayburn House Office Building, Hon. Romano L. Mazzoli presiding.

Present: Representatives Mazzoli, Synar, Morrison, Moorhead, and Swindall.

Staff present: Gail Higgins Fogarty and David W. Beier, counsel; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerk.

Mr. MAZZOLI. The subcommittee will come to order.

Today the Subcommittee on Courts, Civil Liberties and the Administration of Justice will conduct a hearing on H.R. 2223, a bill to extend and clarify the Equal Access to Justice Act.

The chairman of the subcommittee, the gentleman from Wisconsin, Mr. Kastenmeier, was unable to be present today due to a markup in the Permanent Select Committee on Intelligence. However, he has been instrumental in earlier Congresses in the passage of the original Act and is a cosponsor, along with my friend from California, Mr. Moorhead, of the bill, H.R. 2223, which is before us. Also, a major sponsor is the gentleman from Ohio, Mr. Kindness.

[The bill, H.R. 2223 follows:]

99TH CONGRESS
1ST SESSION

H. R. 2223

To amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 25, 1985

Mr. KASTENMEIER (for himself, Mr. MOORHEAD, Mr. KINDNESS, and Mr. FISH) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENTS TO SECTION 504 OF TITLE 5.

(a) AWARDING OF FEES IN ADVERSARY ADJUDICATIONS.—

(1) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Subsection (a)(1) of section 504 of title 5, United States Code, is amended by adding at the end

thereof the following: "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.".

(2) CLARIFYING AMENDMENT.—Subsection (a)(1) of such section is amended by striking out "as a party to the proceeding".

(3) DECISION OF AGENCY TO BE FINAL ADMINISTRATIVE DECISION.—Subsection (a)(3) of such section is amended by adding at the end thereof the following "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.".

(b) DETERMINATION OF FEES DELAYED IN CASE OF APPEAL.—Subsection (a)(2) of section 504 of title 5, United States Code, is amended by adding at the end thereof the following: "When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.".

(c) DEFINITIONS.—

(1) PARTY.—Paragraph (1)(B) of section 504(b) of title 5, United States Code, is amended to read as follows:

"(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;".

(2) ADVERSARY ADJUDICATION.—Paragraph (1)(C) of such section is amended—

(A) by inserting "(i)" before "an adjudication under";

(B) by inserting before the semicolon at the end thereof the following: ", and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)"; and

(C) by striking out "and" at the end thereof.

(3) POSITION OF THE AGENCY.—Paragraph (1) of such section is amended—

(A) by striking out the period at the end of subparagraph (D) and inserting in lieu thereof "; and"; and

(B) by adding at the end thereof the following:

"(E) 'position of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.".

(d) APPEALS OF FEE DETERMINATIONS.—Subsection (c)(2) of section 504 of title 5, United States Code, is amended to read as follows:

"(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.".

(e) AWARDS PAID FROM AGENCY FUNDS.—Subsection (d) of section 504 of title 5, United States Code, is amended to read as follows:

"(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.".

SEC. 2. AMENDMENTS TO SECTION 2412 OF TITLE 28.

(a) CLARIFYING AMENDMENTS.—Section 2412 of title 28, United States Code, (relating to costs and fees) is amended—

(1) in subsections (a) and (b) by striking out "or any agency and any official of the United States" each place it appears and inserting in lieu thereof "or any agency or any official of the United States"; and

(2) in subsection (d)(1)(A) by inserting ", including proceedings for judicial review of agency action," after "in tort)".

(b) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Section 2412(d)(1)(B) of title 28, United States Code, is amended by adding at the end thereof the following: "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.".

(c) DEFINITIONS.—

(1) Subparagraph (B) of section 2412(d)(2) of title 28, United States Code, is amended—

(A) in clause (i) by striking out "$1,000,000" and inserting in lieu thereof "$2,000,000"; and

(B) by striking out "(ii)" and all that follows through the end of the subparagraph and inserting in lieu thereof the following: "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;".

(2) ADDITIONAL DEFINITIONS.—Subsection (d)(2) of such section is amended—

(A) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(B) by adding at the end the following:

"(D) 'position of the United States' means, in addition to the position taken by the United States in the

civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

"(E) 'civil action brought by or against the United States' includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

"(F) 'court' includes the United States Claims Court;

"(G) 'final judgment' means a judgment that is final and not appealable, and includes an order of settlement; and

"(H) 'prevailing party', in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.".

(d) PAYMENT OF AWARDS.—Paragraph (4) of section 2412(d) of title 28, United States Code, is amended to read as follows:

"(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise.".

(e) INTEREST.—Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following:

"(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.".

SEC. 3. AWARDS IN CERTAIN SOCIAL SECURITY PROCEEDINGS.

Section 206 of the Equal Access to Justice Act is amended—

(1) by striking out "Nothing" and inserting in lieu thereof "(a) Except as provided in subsection (b), nothing"; and

(2) by adding at the end the following:

"(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if any fees collected by the claimant's attorney or withheld for such attorney pursuant to such section 206(b) are refunded to the claimant insofar as the fees relate to the same work for which the claimant's attorney is awarded fees under section 2412(d) of title 28, United States Code.".

SEC. 4. REPEALS.

(a) TERMINATION DATES.—

(1) Section 203(c) of the Equal Access to Justice Act (Public Law 96–481) is hereby repealed.

(2) Section 204(c) of the Equal Access to Justice Act is hereby repealed.

(b) LIMITATION ON PAYMENT OF AWARDS.—Section 207 of the Equal Access to Justice Act is hereby repealed.

SEC. 5. AWARDS FOR CERTAIN FEES AND OTHER EXPENSES.

Section 208 of the Equal Access to Justice Act is amended by adding at the end the following: "Awards may be made for fees and other expenses incurred before October 1, 1981, in any such adversary adjudication or civil action.".

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by this Act apply to cases pending on or commenced on or after the date of the enactment of this Act.

(b) APPLICABILITY OF AMENDMENTS TO CERTAIN PRIOR CASES.—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of the enactment of this Act.

Mr. MAZZOLI. I would like to read the chairman's (Mr. Kastenmeier's) statement into the record and then yield to the gentleman from California for anything he might have.

Two of my colleagues and I, the gentleman from California, Mr. Moorhead, and the gentleman from Ohio, Mr. Kindness, have introduced H.R. 2223, legislation to extend and clarify certain provisions of the Equal Access to Justice Act, Title 2, Public Law 96-481. The Act expands the liability of the United States for attorneys' fees and related expenses where it loses in certain adversary adjudications and civil actions.

The major part of the Act covers cases and proceedings which were filed before October 1, 1984. The Act which has been in effect since October of 1981, has been particularly helpful to small businesses and other persons of limited resources. Less than $5 million has been awarded under the Act.

During the last days of the 98th Congress, H.R. 5479, a bill to extend certain provisions of the Act and to clarify it, was passed unanimously and sent to the President. Unfortunately, the President vetoed it after the Congress had adjourned.

This year, my colleagues and I have worked with the administration, small business community, and other persons to improve the legislation. H.R. 2223 is the subject of the hearing today, and it clarifies that the United States will be liable unless the position of the government, including the litigation position, as well as the action or failure to act by the government upon which the proceeding or action is based, is substantially justified or unless special circumstances would make an award unjust. Eligibility would be limited to individuals with a net worth of $2 million, or less, or businesses with $7 million or less.

The legislation allows the agency rather than the adjudicatory officer to make the final decision on fee awards at the agency level. A party dissatisfied with the award may appeal a denial of, or a measure of the award. The legislation makes other improvements in the Act. The legislation is a priority issue for the small business community and is a valuable vehicle for improving access to justice.

I yield to the gentleman for his statement.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I strongly support this legislation. The act provides an important avenue of redress for small businesses and individuals with limited assets when they are forced to litigate against unreasonable Government regulation in order to vindicate their rights.

I want to congratulate the Department of Justice, the small business community, the public interest groups, my colleagues on the committee, and the committee staff, both majority and minority, for the work that they have done in order to bring all of the parties concerned together on this piece of legislation. And I certainly want to urge early enactment.

Mr. MAZZOLI. Thank you very much. I thank my friend from California, distinguished ranking member.

Our first witness today is Carolyn B. Kuhl, who is Deputy Assistant Attorney General for the Civil Division at the U.S. Department of Justice. Ms. Kuhl, the subcommittee welcomes you. Your statement will be made a part of the record. You may read it, or from it, however you please. Welcome.

TESTIMONY OF CAROLYN B. KUHL, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Ms. KUHL. Thank you, Mr. Chairman. With your permission, I will summarize my statement this afternoon.

Mr. MAZZOLI. Thank you.

Ms. KUHL. I appreciate having this opportunity to testify before the subcommittee on the reauthorization of the Equal Access to Justice Act. The administration has been working with the Congress for 2 years now in an effort to reauthorize the Equal Access

to Justice Act and to solve problems which have arisen in the program.

Most recently, the reauthorization passed by the last Congress was vetoed because of the strong concerns expressed by the President in his veto message. The President did, however, emphasize that he supported very strongly the concept of the Equal Access to Justice Act as a whole.

However, as you have mentioned, Mr. Chairman, we have been working with the staff of this subcommittee to try to solve the concerns expressed by the President in his veto message, and we have been very pleased and grateful for the cooperation we have received in reaching a compromise. I would like to thank the committee staff for the cooperation that we have received.

As a result of our efforts, the administration has reviewed the provisions of H.R. 2223, and I am pleased to say, endorses that bill.

I would like to mention just a few provisions of the bill which are of particular importance to us. H.R. 2223 would adopt language defining "position of the United States" for the purposes of section 2412 to mean the position taken in the litigation and the agency action, or failure to act, upon which the civil action is based. Under this definition, the agency action which forms the basis of the litigation could be considered in determining whether the United States should pay attorneys' fees.

We regard this definition as directing the courts to look only at the agency action which was the subject of the lawsuit, and not to permit the courts to look at other agency actions which were not judicially reviewable or were not the subject of the underlying lawsuit.

This represents a significant concession by the administration in that it permits the courts, on the basis of the record of the case, to consider agency actions which, while the basis of the lawsuit, were not considered because the case was settled or because it was argued on purely legal motions.

At the same time, we believe that the definition will prevent the courts from expanding the fee proceeding into a trial of new aspects of the agency's conduct.

The courts would consider the action, whether it be a regulation or an enforcement action, which brought the parties to court. They could not expand the fee proceeding to include aspects of the agency's "underlying action" which were not reviewable by the court in the case in chief. The bill adopts a similar definition for section 504.

In addition, the bill includes language amending section 504 and section 2412, making it clear that the determination of whether the United States is substantially justified will be made on the basis of the record made in the agency proceeding or the court proceeding for which fees are sought.

This language is intended to prevent new evidentiary proceedings that prolong the fee consideration and make a whole new inquiry into the agency's action. Under this provision, the court would decide the substantial justification question based on the record before it as argued in the pleadings, including affidavits filed by both sides.

We support the provision in the bill that would clarify the agency's right to review decisions of administrative law judges awarding or denying fees. We believe this provision recognizes the relationship of the administrative law judge to the agency. Most decisions by administrative law judges are subject to agency review. We see no reason to single out this area for different treatment.

To illustrate the problems answered by this section, if an agency reverses the underlying decision of the administrative law judge, the agency certainly should be able to reverse an award of fees which may have followed that decision.

We support the provision of H.R. 2223 establishing a definition for "prevailing party" in land condemnation cases. This clarification will simplify litigation over fees in land condemnation cases. The definition fairly balances the rights of the landowners with those of the Government in these cases.

Again, let me say the administration is firmly committed to the policies of the Equal Access to Justice Act and I am pleased to be able to announce the administration's support for this bill.

[The statement of Ms. Kuhl follows:]

STATEMENT

OF

CAROLYN B. KUHL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

OF THE

HOUSE JUDICIARY COMMITTEE

CONCERNING

H.R. 2223

THE REAUTHORIZATION OF
THE EQUAL ACCESS TO JUSTICE ACT

ON

APRIL 30, 1985

Thank you, Mr. Chairman. I appreciate having this opportunity to testify before the Subcommittee on the reauthorization of the Equal Access to Justice Act. The Administration has been working with the Congress for two years now in an effort to reauthorize the Equal Access to Justice Act and to solve problems which have arisen in the program. I testified a little more than a year ago before this Subcommittee and discussed at some length our suggestions for improvements in the Act. The Administration has reviewed the provisions of H.R. 2223 and, I am pleased to say, endorses that bill. However, in light of the complexities involved in the reauthorization of the Equal Access to Justice Act, other concerned agencies may be providing additional information to the Committee.

As you are aware, President Reagan vetoed the reauthorization bill passed in the last Congress, notwithstanding his strong support for the underlying program. In his veto message, the President expressed his concern with several provisions of the bill which passed Congress. The importance of these concerns was emphasized by the fact that the legislation would have permanently reauthorized the Act, which meant that we would not be revisiting these issues for some time to come.

The first issue raised in the President's veto message was the inclusion of a definition of "position of the United States"

which would require the court to look not only at the position taken by the United States in the litigation, but also at the "underlying agency action" to determine whether the position taken by the United States in the litigation was substantially justified and, thus, whether fees should be awarded. The President expressed his concern that this new definition would vastly increase and complicate litigation over attorneys' fees and would result in extensive discovery into the internal decision-making processes of the agencies -- something which could have a chilling effect on the free flow of ideas so very important to responsible decision making.

Under the definition included in the bill which the President vetoed, fee litigation could be vastly increased because the court would not merely look at the position taken by the United States in the litigation along with the accompanying evidence and legal arguments submitted in the trial of the case, but would have to consider additional evidence relevant to the agency action which underlay the position taken in the litigation. The fee proceeding could involve substantially new litigation into the reasonableness of government conduct -- an inquiry which could differ substantially from that undertaken in the case in chief, depending on the facts and legal issues involved in each case. In addition, this inquiry could result in discovery into internal agency deliberations to determine

whether agency personnel disagreed with a particular decision, on the grounds that this evidence is relevant to the determination of whether the agency's action was substantially justified.

H.R. 2223 would adopt language defining "position of the United States," for the purposes of section 2412, to mean the position taken in the litigation and the agency action, or failure to act, upon which the civil action is based. Under this definition, the agency action which forms the basis of the litigation could be considered in determining whether the United States should pay attorneys' fees. We regard this definition as directing the courts to look only at the agency action which was the subject of the lawsuit, and not to permit the courts to look at other agency actions which were not judicially reviewable or were not the subject of the underlying lawsuit. This represents a significant concession by the Administration in that it permits the courts, on the basis of the record of the case, to consider agency actions which, while the basis of the lawsuit, were not considered because the case was settled or because it was argued on purely legal motions. At the same time, we believe the definition will prevent the courts from expanding the fee proceeding into a trial of new aspects of the agency's conduct. The courts would consider the action, whether it be a regulation or an enforcement action, which brought the parties

to court. They could not expand the fee proceeding to include aspects of the agency's "underlying action" which were not reviewable by the court in the case in chief. The bill adopts a similar definition for section 504.

In addition, the bill includes language amending section 504 and section 2412, making it clear that the determination of whether the United States is substantially justified will be made on the basis of the record made in the agency proceeding or the court proceeding for which fees are sought. This language is intended to prevent new evidentiary proceedings that prolong the fee consideration and make a whole new inquiry into the agency's action. Under this provision, the court would decide the substantial justification question based on the record before it as argued in the pleadings, including affidavits filed by both sides.

We support the provision in the bill that would clarify the agency's right to review decisions of Administrative Law Judges awarding or denying fees. We believe this provision recognizes the relationship of the Administrative Law Judge to the agency. Most decisions by Administrative Law Judges are subject to agency review. We see no reason to single out this area for different treatment. To illustrate the problems answered by this section, if an agency reverses the underlying decision of

the Administrative Law Judge, the agency certainly should be able to reverse an award of fees which may have followed that decision.

We support the provision in H.R. 2223 establishing a definition for "prevailing party" in land condemnation cases. This clarification will simplify litigation over fees in land condemnation cases. The definition fairly balances the rights of the landowners with those of the government in these cases.

Again, let me say that the Administration is firmly committed to the policies of the Equal Access to Justice Act and I am pleased to be able to announce the Administration's support for this bill.

Mr. MAZZOLI. Thank you very much, Ms. Kuhl.

I yield myself 5 minutes to begin questions.

If the questions I propound sound as if I don't understand them, I don't in many cases understand them. This is a little more complicated than I had figured, and I tried to brief myself this morning knowing that I would be substituting for Congressman Kastenmeier. But these are some of the things which he, if he were here, would obviously ask with a lot more authority and knowledge, but I do want to put them on the record.

In an attempt to limit the amount of discovery available in fee proceedings, the Department recommends the language in section 1(b) and 2(b) of the bill, that is, a determination based on the record of the proceeding.

We have been told by experienced litigators in this area of law that the Government is the most frequent user of discovery in fee proceedings. Therefore, would this limitation work against the interest of the Government—this limitation which is limiting the amount of discovery available in fee proceedings—essentially to the record which is made in the proceeding?

Would that limit the Government, even though I am sure it's meant to limit plaintiffs who are successful?

Ms. KUHL. It is meant to limit both sides. And our primary concern here has been that we not aggravate the situation where the fee proceeding becomes more complicated than the case in chief. We feel that that's a very——

Mr. MAZZOLI. Have you had that experience? Have you been involved in any of these cases, actually or directly?

Ms. KUHL. Yes; I supervise this type of litigation.

I am not familiar specifically with cases where the Government has asked for discovery. Of course, many of these cases are handled by the U.S. attorney's offices and I would not necessarily be familiar with each and every one of those cases.

Mr. MAZZOLI. So your conclusion essentially is that putting that kind of a limitation wouldn't hobble the Government in its activities; is that correct?

Ms. KUHL. No, we don t believe so.

Mr. MAZZOLI. Nor, I assume, it wouldn't put any unnecessary fetters on the individual or corporation; is that also your belief?

Ms. KUHL. That's correct.

Mr. MAZZOLI. They could make their case from that?

Well, then to flow from that, by requiring the fee decision be based mostly on the record, would it be possible that attorneys involved in that litigation which spread upon the record material which they would not normally do in order to later give undergirding to their fee proceeding, or fee claim, which material would clutter the record and cause it to be extended beyond what is necessary? Do you have any feeling on that?

Ms. KUHL. We don't believe that that's the intent of the legislation. The legislation, of course, pertains only to the fee proceeding itself, and in no way expands the nature of the issues that could be discussed in the case in chief.

Mr. MAZZOLI. So it is up to the judge to decide what can be put into a case in chief, and if they go too far afield it is up to him or

her to haul them back in. Is that the idea, and not allow them to be put on the record?

Ms. KUHL. The judge should be trying the case in chief with reference to the legal issues presented in that case, and should not be allowing the parties to go beyond the legal issues in that case in order to try to have a leg up in the fee proceeding.

Mr. MAZZOLI. It probably would be a bit of tug of war between the attorneys and the judge to decide what goes on the records. So you don't feel that there is any problem so long as the judge exercises appropriate authority which, again, he or she has to keep the record clean?

Ms. KUHL. Again, I think that the important thing for the courts to understand about this legislation is that it is not intended to change anything that they would otherwise do in their case in chief.

Mr. MAZZOLI. In the last Congress, a provision was included in the bill which included the Board of Contract Appeals and did so in a retroactive fashion.

What is the position of the Department of Justice on the inclusion of the Contract Appeals Board?

Ms. KUHL. Of course, the bill that has been introduced, H.R. 2223, does not have retroactive coverage in it, and we would support defining the coverage of the bill as a whole in the same way. In other words, once coverage is defined for certain provisions of the bill, to have it defined the same way for all provisions.

Mr. MAZZOLI. To remind me, you say that this is not a retroactive bill, this is prospective of what is before us today?

Ms. KUHL. It is prospective.

Mr. MAZZOLI. Is the Board of Contract Appeals in the bill before us today, H.R. 2223?

Ms. KUHL. The Board of Contract Appeals would be covered.

Mr. MAZZOLI. It is in there. So, the Department does not favor retroactive application to cover the cases from October 1984 until whenever this bill goes in; is that correct?

Ms. KUHL. I believe that the bill applies to all situations from October 1984 forward, but as to the Board——

Mr. MAZZOLI. That's right. What do you mean by retroactive? Maybe I just misunderstand.

Ms. KUHL. But as to the Board of Contract Appeals, I believe——

Mr. MAZZOLI. It would be prospective——

Ms. KUHL [continuing]. That the last legislation—I believe that the last bill covered them back for several years——

Mr. MAZZOLI. I understand you.

Ms. KUHL [continuing]. Before enactment of the bill. That type of retroactivity, we believe may lead to some unfairnesses and increase in the workload.

Mr. MAZZOLI. So, we covered cases that have arisen under the bill from October 1984, from the time the bill was vetoed and no longer existed.

Ms. KUHL. That's correct.

Mr. MAZZOLI. The Contract Appeals Board would look forward prospectively entirely on its actions. Is that the idea?

Ms. KUHL. It would be covered, again, from 1984 forward.

Mr. MAZZOLI. Also 1984 forward.

Ms. KUHL. I believe.

Mr. MAZZOLI. But not back to 1981, which is when——

Ms. KUHL. But not back to 1981. That's the main point on retroactivity.

Mr. MAZZOLI. As I say, I apologize for asking questions which are not as knowledgeable as I wish they were.

What is the position of the Department of Justice on the fact of whether a Government action is egregious and, therefore, would lead to an award of attorneys' fees that there be a maximum fee allowed. Is there one on capping the amount of fees regardless of the nature of the Government action?

Ms. KUHL. I would refer the committee to a statement by the former Deputy Attorney General Carol Dinkins before the Subcommittee on the Constitution of the Senate Judiciary Committee concerning a bill introduced in the last Congress called the Legal Fees Equity Act. In that testimony, the Department and the administration supported an overall fee cap on the hourly fee that could be charged by attorneys in any case, regardless of subject matter against the Government .

Mr. MAZZOLI. Is there a fee cap in this bill now, H.R. 2223?

Ms. KUHL. There is a fee cap of $75 an hour. In other words, the Equal Access to Justice Act has always had a $75 an hour fee cap.

Mr. MAZZOLI. The amount is not changed by this bill, that remains the same?

Ms. KUHL. That remains the same.

Mr. MAZZOLI. The number of hours is depending upon the nature of the case or that type of thing. It is up to the adjudicative officer and reviewable, but it's at $75 an hour—it can be less, then, but not more than 75?

Ms. KUHL. That is correct.

Mr. MAZZOLI. My 5 minutes is expired. The gentleman from California is recognized.

Mr. MOORHEAD. Thank you.

I was just wondering, you know, Senator Grassley put in an amendment to make the Board of Contract Appeals within the scope of the act and retroactive last year. I just wondered if the Senate did this again this year, if that would affect the support of the Department of Justice's bill?

Ms. KUHL. Of course, I don't believe that the Senate committee, the relevant Senate committee, has focused on a bill as yet, so we are not aware of whether or not the Senate will be supporting that kind of retroactive application of the Board of Contract Appeals coverage. So, quite frankly, I have to say we really haven't addressed that issue.

Mr. MOORHEAD. We are waiting to see what happens.

There is one provision in the bill that could be somewhat ambiguous. Section 2(b) of H.R. 2223 reads in part, whether or not the position of the United States was substantially justified shall be determined on a basis of the record. What is the Department's interpretation of the word "record" in the section?

I ask the question because one of the witnesses that will testify later proposes a hypothetical situation where the EAJA fee claimant would have to rebut any agency showing that its failure to act was substantially justify. Yet, in such a situation there would

never be a formal hearing record of an agency's failure to act. In such a situation, wouldn't it be necessary to construe the term record broadly to include all relevant evidence, not merely a hearing transcript and associated exhibits?

Ms. KUHL. We believe that the proper interpretation of "record" as used in this bill is to mean what is actually introduced in court in the case in chief or before the administrative agency. This would include any pleadings or briefs that were filed in either of those proceedings. And, of course, we have taken great care in this bill to provide that there would not be any additional evidentiary proceedings and that no additional evidence would be able to be introduced.

Mr. MOORHEAD. If it never got quite as far as a hearing, well, of course, it would be work in defense that was done on this part of the person being sued, would the lack of a record in court be sufficient to be interpreted one way or the other by the court?

Ms. KUHL. Of course, EAJA is only applicable where there has either been an adversary administrative proceeding before the agency——

Mr. MOORHEAD. There can be a filing and you have to prepare—and it can be dropped prior to the time of the actual hearing itself.

Ms. KUHL. That's right. But in that case there will have been pleadings on file—by the very nature of the presenting the case there will at least be a complaint and an answer on file. It is those pleadings that will serve as a basis for determining the propriety of an award.

Mr. MOORHEAD. The purpose of my question is to establish a record here so that the people that are interpreting the bill later on will have some basis too.

Thank you, Mr. Chairman.

Mr. MAZZOLI. Ms. Kuhl, just a couple of Chairman Kastenmeier's questions to sort of flesh out the record. A later witness will suggest that discovery provisions in H.R 2223 be amended to read, "discovery may be held upon order of the court, or an adjudicative officer for good cause shown."

Would you have any position of the Department of Justice on that?

Ms. KUHL. We support the bill as is, and we would object to an exception to the discovery requirement for some kind of good cause. I am not sure what good cause means, and that's precisely the problem, Mr. Chairman, because that would open the door for the courts to lengthen these fee proceedings in a way we have been trying to avoid.

Mr. MAZZOLI. Another question of the chairman dealing with the statement which you made early in your statement that other concerned agencies could be providing additional information, or may be providing additional information to the committee.

Do you have any, or are you equipped to disclose what the views of other agencies would be, or is this a unified Government position which is yours now?

Ms. KUHL. Of course, you have here the support of the administration for this bill. I did speak with a gentleman from one of the independent agencies last week who wondered whether it might be

appropriate for him to separately indicate, on behalf of his agency, their support, and in particular their pleasure with the——

Mr. MAZZOLI. I can't speak for Chairman Kastenmeier, but I am sure he would want to know any views. I don't know who is sitting in this room that would have a contrary view, but I think the quicker we have it, the better, because by Thursday I think the chairman intends to start marking the bill up. So the quicker there are views, which perhaps may not be totally consonant here, expressed, the quicker and better we are.

A last question: Do you have any information on what percentage of cases ordering court awards of fees under the Act has the United States itself sought appeals from an award of fees? Is there any percentage of that?

Ms. KUHL. I don't have a figure on that, Mr. Chairman. Of course, the Solicitor General must approve each and every one of those appeals when it is a case that the Government has lost in the court below, and we have tried to be very sparing in those. On the other hand, probably the percentage of appeals has been greater during this period since the Equal Access to Justice Act was passed because there is a time of working out legal issues that arise.

Mr. MAZZOLI. You sort of anticipated the chairman's last question. Do you think that from now on it will abate a bit as every party seems to understand it better—at least the Government's standpoint—and know what to anticipate and how to handle it?

Ms. KUHL. I would think that certainly over time as these issues are litigated, it would abate. And I would also hope that as a result of some of the clarifications, that everyone has worked hard to put in this legislation, that some of these issues would also abate.

Mr. MAZZOLI. Good.

Ms. Kuhl, there may be questions which I failed to ask which the chairman may wish to suggest by letter or telephone call. For the time being, thank you, and you are free to leave. We appreciate your help.

Ms. KUHL. Thank you, Mr. Chairman.

Mr. MAZZOLI. We would like to call our panel, Ms. Nan Aron, executive director of Alliance for Justice; Ms. Sally Douglas, manager of legislative research for the National Federation of Independent Business; and Mr. David Stewart, an attorney representing Small Business United and Small Business Legal Defense Committee.

Your statements will be made a part of the record, and if there is a way that you can summarize your statements for the purpose of any questions, that would be delightful. If not, you can certainly read it if you wish.

We will take them as they are listed. Ms. Aron, first.

TESTIMONIES OF NAN ARON, ESQ. DIRECTOR, ALLIANCE FOR JUSTICE; SALLY L. DOUGLAS, MANAGER, LEGISLATIVE RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND DAVID O. STEWART, ESQ., FIRM OF MILLER, CASSIDY, LARROCA & LEWIN, ON BEHALF OF SMALL BUSINESS UNITED AND SMALL BUSINESS LEGAL COMMITTEE

Ms. ARON. With your permission, I will briefly summarize my statement.

Mr. MAZZOLI. OK.

Ms. ARON. I appreciate the opportunity to be here on behalf of the Alliance for Justice and to testify in favor of reauthorization of the Equal Access to Justice Act. The alliance is an association of public interest legal organizations.

I am also pleased to be part of a broad coalition of organizations supporting passage of this bill.

The alliance strongly favors the act, which has increased accessibility of citizens and small businesses to the Federal courts and agencies, and made it possible for them to protect their rights and interests in these forums.

In our experience, the act has worked well and at minimum cost to the Government. The courts are giving careful scrutiny to fee applications being filed and awarding fees on a modest scale.

In our view, H.R. 2223, with one exception, is sound and clarifies provisions in the original act which led to some confusion in the courts. I want to note especially our strong agreement with the committee's definition of the position of the United States and think the definition accurately conforms both with legislative intent and the act's intended purpose.

Our sole problem concerns the new language pertaining to discovery. This language would work to automatically bar discovery at the fee application stage. In the vast majority of cases, prevailing parties don't engage in discovery at this stage. There is no incentive on their part to draw out or delay the process of obtaining fees. If anything, they are more than eager to expedite the fee application process.

In addition, I don't know of any abuses of discovery that have been caused by private parties. And I would like to add that neither the President, in his veto message, nor the Department of Justice has been able to identify any abuses that have occurred with discovery.

My view is, if you address the problems raised in the President's veto message, the information being sought by private parties that the President is really concerned about is already privileged. The Government's privileges for discovery and litigation—executive, attorney work product, and attorney/client—already bar and cut back substantially on the information can be obtained through discovery. In fact, going to one of the questions that you asked, the preclusion of discovery may work against the very result it hopes to achieve, that being the expeditious handling of the fee proceeding. Knowing that parties cannot obtain discovery at the fee level, parties may ask for more information and documents, file more interrogatories in order to ensure that the record is as full and complete as possible.

The parties will want to make sure that every conceivable issue which might have some relevance on the issue to substantial justification is fully briefed and documented. In my view, this will lead to overdiscovery at the lower level.

It will also lead to further confusion. It is often unclear what the record is, and whether the record that has been filed by an agency, for instance, and challenges to an agency rulemaking are, in fact, the whole record. Sometimes these kinds of issues are hotly disputed.

The definition, as Mr. Stewart points out in his testimony, of the term "record" is vague, and can only engender more litigation and hearings over its meaning.

If this committee believes it necessary to address the President and Justice Department's concern about discovery, the Alliance has offered a substitute language which we believe is more appropriate. In our testimony we outlined it would read as follows: Discovery may be held upon order of the court or adjudicative officer for good cause shown. This language places the burden on the parties seeking discovery to show good cause instead of the usual procedure under the Federal Rules of Civil Procedure, whereby the burden shifts away from the moving party to the other to show that discovery is either irrelevant or privileged. It vests discretion with the judge, who has heard the case and is most familiar with the factual and legal issues. If the judge believes additional discovery is warranted, then it ought to be permitted.

We would request that the committee give careful review to this issue and to our modifying language.

We thank you very much for the opportunity to appear and we urge the committee to expedite passage of this legislation.

[The statement of Ms. Aron follows:]

HEARING BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND

THE ADMINISTRATION OF JUSTICE

ON

H. R. 2223

STATEMENT OF NAN ARON

ON BEHALF OF THE ALLIANCE FOR JUSTICE

April 30, 1985

51-916 O - 86 - 2

My name is Nan Aron, Director of the Alliance for Justice, a national association of public interest legal organizations. I am pleased to be here once again to testify on behalf of the reauthorization of the Equal Access to Justice Act. The Alliance has testified in the past in support of this legislation, which we believe has effectively achieved its purpose of enabling citizens of modest means to challenge unjustified government actions. It has provided for citizen access to courts and administrative proceedings at a time when obtaining justice has become enormously expensive for citizens.

At the outset, the Alliance wishes to let you know how much we appreciate your hard work and perseverance on this legislation over the past few years. We are pleased that you are again taking the lead in ensuring the bill's prompt reenactment.

Our experience with the EAJA is that it continues to work well and at a minimum cost to the government. Courts are giving careful scrutiny to the fee applications being filed and awarding fees on a modest scale. In fact, for the first three years that the Act was in effect, private parties recovered an average of no more than $1 million per year in EAJA fees. This figure is far below the original estimate of $200 million a year provided by the Congressional Budget Office. It is important that the EAJA be reenacted as soon as possible.

Our position is that, for the most part, amendments to Section 2412 of Title 28 contained in H. R. 2223 are sound and clarify provisions in the original Act which led to con-

fusion in the courts. Our comments below are directed at specific amendments in the bill.

First, and most important, we are pleased to see that the legislation correctly clarifies legislative intent regarding the meaning of the term "position of the United States." The amendment makes clear that the term "position of the government" includes the agency conduct that led to the litigation. President Reagan's position (contained in his Memorandum of Disapproval of November 9, 1984, in vetoing H. R. 5479) that the term refers only to the government's litigation position, is erroneous. It directly contradicts both the legislative history of the original Act, and its fundamental purpose--to deter unlawful government conduct. The Senate specifically addressed this matter in its report and concluded that,

> To follow an interpretation that the 'position of the United States' refers only to the government's litigation stance is to imply that no matter how outrageously improper the agency action, and no matter how intransigently a wrong position has been maintained by the agency prior to the litigation, and no matter how many times the same agency repeats the same offense, the statute has no application as long as employees of the Department of Justice act reasonable when they appear in court.
> Senate Report 98-586

The courts are split on the meaning of this statutory phrase. Some have limited its meaning to the government's litigation position while others have looked at the underlying agency conduct. The current amendment clarifies that the correct interpretation of "position of the United States" is to be found in the line of cases including Natural Resources Defense Council v. U. S. Environmental Protection Agency 703 F.2d 700 (3rd Cir. 1983); Rawlings v. Heckler, 725 F.2d

1192 (9th Cir. 1984); and Nunes-Correia v. Haig, 543 F.Supp. 812 (D. D. C. 1982).

Second, in our view, the language limiting the discovery at the fee stage of the proceedings is both unnecessary and unwarranted. It would essentially preclude parties from engaging in any discovery at the fee stage, by providing that the determination of whether the position of the United States was substantially justified be determined on the basis of the record which is made in the civil action for which fees and other expenses are sought.

The reason for this restriction originates with the President's veto message. He argued that allowing courts to examine an agency's underlying action would lead to extensive discussion of how the action was formulated. The Justice Department has also maintained that adopting a broader view of the position of the United States will result in more discovery.

However, we believe that the administration's position is unsupported by any evidence. Government officials have failed to document any discovery abuses under the statute. They have not been able to provide any special examples and we are not aware of any. It is interesting to note that neither the Justice Department nor other government officials pressed this argument during earlier debates on the issue of "position of the United States." It was raised only as an afterthought when the administration decided to kill the Act.

It would indeed be rare for private parties to request additional discovery--their experience has been that it is

unnecessary since the question of whether the government's position was substantially justified is in general a legal, not factual one. Most parties, after prevailing in litigation, are eager to conclude the fee process as soon as possible, not prolong it.

In fact, the Act specifically informs parties that they will recover no fees if they unreasonably protract or delay the proceedings. In addition, there are already ample safeguards in the Federal Rules of Civil Procedure and courts possess the tools to limit excessive discovery. The government's privileges for discovery in litigation--the executive, attorney work-product and attorney-client privileges--already adequately allow the government to withhold most documents which prevailing parties would seek to discover.

If, however, the Committee believes it is appropriate to address the government's argument that discovery will increase, we would be willing to accept some limitation of discovery. We suggest the following language be incorporated as an amendment: "Discovery may be held upon order of the Court for good cause shown."

Finally, we believe that the definition of what constitutes a "final judgment" in the current amendment is the appropriate one. Since the Act's inception, there has been a great deal of confusion over this issue, because nowhere was the term defined. Consequently, courts have been split over the issue. Some have held that the fee application had to be filed within thirty days of the District Court judgment. Others have said it must be filed after the completion of

appellate proceedings.

Clarifying the definition of "final judgment" to mean when the government's right to appeal the order has lapsed, will end the confusion and avoid fragmentation of fee petitions. It makes more sense for a claimant to file a single application at the conclusion of the proceedings, rather than to engage in fee litigation when there may well be an appeal on the merits. The most recent case on the issue, Miller v. United States, 753 F.2d. 270 (3rd Circuit, 1985) is in accord with this clarification.

In conclusion, there continues to be strong support for reenactment of the EAJA from the small business community as well as individual citizens. The Act has worked well by encouraging responsible litigation against the government by persons of limited means.

This completes my prepared statement. I would be happy to respond to any questions you may have.

Mr. MAZZOLI. Thank you, Ms. Aron.

Ms. Douglas.

Ms. DOUGLAS. Thank you, Mr. Chairman .

On behalf of the National Federation of Independent Business and our more than 500,000 small and independent business owners across the country, I would like to thank you for this opportunity to talk about the reauthorization of equal access.

Since the President's veto of H.R. 5479 on November 9 last year, a series of meetings and discussions have occurred involving many interested parties, outside of Congress and inside of Congress. Those outside have included NFIB, SBU, and NSB, the Chamber, other small business organizations, representatives of public interest groups, OMB, the Department of Justice, and the SBA's Office of Advocacy.

We have all met in the attempt to devise some common ground, some middle position, to satisfy the fears and the concerns of both sides.

In concert with members of this subcommittee and their fine staffs, we have come up with a product which I believe all parties can support—NFIB certainly supports it. H.R. 2223 is a good product that merits endorsement by both Congress and the President and merits speedy passage.

We were, for reasons which are fairly obvious, dismayed over the administration's veto of this legislation last year. We were particularly dismayed over their interpretation of the position of the United States. The language used in the previous bill was never intended to be anything more than a restatement of the definition of position which, expressly described, would have been the intent of Congress all along, and that is: That when the small businessman meets the Government in court in determining substantial justification, the court does not just address how the Government conducted itself during the litigation but what prompted the action that started the proceedings in the first place.

We believe that the compromise language in H.R. 2223 should satisfy both parties. Ms. Kuhl just testified that the administration has endorsed it, and we endorse it as well. We feel it strikes a fair balance between their fear that we are going to have unnecessary protraction of proceedings in fee cases. And we also believe that given a proper rendering of legislative history, that it will be clear that the underlying action, or the action which prompted the proceedings in the first place, will be considered by the courts along with whatever position the Government has taken to that point. Most especially, the language in the bill would seem to make it clear that if the case is settled before both parties get to court that EAJA will cover those cases. And that was a particular concern of ours.

We appreciate the President's attempt in his message to indicate his strong commitment to reauthorization of the bill and also to compel agencies to be mindful of equal access even in this period where the statute has not been enforced.

The hard fact is, however, small business owners have been bereft of EAJA's protections now for 7 months. It is imperative reauthorization be accomplished without further delay. And it is also imperative, as this bill has included, that there be included a provi-

sion making the provisions retroactive to cover the period between now and the President's veto.

Thank you, Mr. Chairman.

[The statement of Ms. Douglas follows:]

STATEMENT OF

SALLY L. DOUGLAS

Manager of Legislative Research

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Subcommittee of Courts, Civil Liberties, and Administration of Justice, House Judiciary Committee

Subject: Reauthorization of the Equal Access to Justice Act

Date: April 30, 1985

Mr. Chairman and distinguished members of the Subcommittee, on behalf of the National Federation of Independent Business (NFIB) and its membership of more than 500,000 small and independent businesses across this nation, I want to take this opportunity to commend you for your continuing good efforts and persistence in the struggle to reauthorize the Equal Access to Justice Act.

EAJA has had a turbulent history. Orinally conceived in 1977, the act was finally approved during the closing hours of the 96th Congress. The act contained a sunset provision, compelling Congress to review and reauthorize EAJA before its expiration date of September 30, 1984.

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At the end of 1982, oversight hearings began on EAJA, and by the closing hours of the last Congress a bill to reauthorize EAJA as a permanent statute had passed both Houses of Congress by unanimous consent. Much to our dismay, the reauthorization bill, H.R. 5479, was pocket vetoed by President Reagan on November 9, 1984.

In his memorandum of disapproval, the President cited the definition of "position of the U.S." and the interest provision as the two reasons for vetoing H.R. 5479. In the first case, "position of the United States" was opposed on the grounds that the courts would be furthered burdened with needless and wasteful litigation, the free exchange of ideas and positions essential to good government would be undermined, and extensive discovery procedures would be instituted by private parties to secure their fee awards.

In the second case, the interest provision was opposed on grounds of equity, i.e. that the provision would give lawyers receiving awards under the act more favorable treatment than "any other group entitled to interest payments from the United States."

It must be said that from the small busness perspective, the veto message is in large part a misinterpretation of fact and intent. The interest provision, for example, does not give more, but rather less, preferential treatment to lawyers than the 45-day interest provision contained in the Prompt Payment Act (P.R. 97-177), which governs payments by the U.S. to government contractors. Even so, the small business community has no

objections to structuring the interest provision more in conformance with current procedures in other kinds of court judgments.

However, we were deeply dismayed over the Administration's interpretation of "position of the U.S." The language used in H.R. 5479 was never intended to be anything more than a re-statement of the definition of position which expressly described what had been the intent of the Congress all along. That is, the agency or the court, in determining substantial justification, was to consider not only the position the United States takes in the administrative or court litigation, but also was to consider the action which prompted the proceedings in the first place.

The average small business owner will go to almost any lengths to avoid litigation. Getting involved in litigation is the final step, after he's been pushed to the wall and has no other recourse. Equal Access to Justice was intended to diminish the deterrent effect on private parties of assuming the prohibitive costs of fighting unwarranted actions by government agencies. Congress was quite clear about this point. It seems equally clear to us that whatever action or inaction prompted the small business owner and the United States to face off in an administrative proceeding or in a court of law is the basis of the proceeding. When the small business owner wins on the merits, what sense does it then make to limit the government's burden of proof to its conduct in the adjudicative hearing or trial and ignore what went before? The small business owner's primary fight is over the unwarranted

enforcement action or the lack of enforcements, or the award of a contract under questionable circumstances, or the unjustified levey of a fine, and so on. These are the issues upon which the question of substantial justification rests, and this is where the government's burden of proof must ultimately be focused.

It is to the President's credit that even as he vetoed H.R. 5479, he expressed his commitment to reauthorization of EAJA, his willingness to work with Congress to modify and improve the act, and his promise that permanent and retroactive reauthorization would be a high legislative priority of the Administration in this Congress. Between the time of the veto and today's hearing, numerous discussions have taken place involving all interested parties, and the result is H.R. 2223, introduced by Chairman Kastenmeier, Mr. Fish, Mr. Moorehead, and last but not least, Mr. Kindness.

H.R. 2223 is the product of concerted good faith efforts by all. NFIB strongly supports the bill, and we will work hard to ensure its passage. I will discuss key provisions which we believe are critical to meaningful, effective reauthorization of the Equal Access to Justice Act.

H.R. 2223 contains compromise language to clarify what is intended by "position of the agency" and "position of the United States." "Position of the agency", for purposes of administrative cases under section 504 of title 5 U.S.C., means, "in addition to

the agency position in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based" (emphasis added). Further, the language prohibits reimbursement of fees or expenses "for any portion of the adjudication in which the party has unreasonably protracted the proceedings." We believe this language accomplishes two critical objectives. First, it makes crystal clear that the action or failure to act which prompted the formal proceedings must be considered in determining substantial justification, but there are proscriptions against unreasonable delays in resolving a case. The language strikes a fair balance between the rights of the private party for a fair and just review and the concerns of the U.S. about intrusions into the internal processes of the government and the overburdening of courts. NFIB supports these changes. We also support the parallel amendments to section 2412 of title 28 U.S.C. on discovery and on the "position of the United States," which means, in addition to the position in the civil action, the action or failure to act which is the basis of the civil action.

While we appreciate the President's attempt to compel agencies to continue to be mindful of the EAJA precepts, the hard fact is that small business owners have been bereft of EAJA's protections for the past seven months. It is imperative that reauthorization accomplished without further delay and reauthorization must include a provision ensuring coverage for cases initiated or disposed of during the time EAJA was not in effect (October 1, 1984 through date of reenactment). H.R. 2223 contains such a provision, and we support it.

An issue which is related to the litigation vs. prelitigation controversey is the issue of fee awards in cases where the parties reach a settlement before the case is brought to a hearing. In those courts which have adopted the narrow interpretation of "position", fee awards have been denied on the grounds that the U.S. acted reasonably in coming to settlement. Yet the fact remains that small business owners can and do incur significant fees and expenses before they ever get to court. An additional concern is that to deny fees in these cases gives a signal to agencies that they may continue unwarranted behavior up to the point of settlement without incurring penalty. The deterrent effect of the act is thus reduced to a considerable extent. We are therefore pleased to see a definition of "final judgment' inserted in EAJA which includes orders of settlement.

One suggestion of the Administration which we have opposed is giving the agency right of the final decision on fees and expenses in administrative cases. It has been argued that this authority, given the adjudicative officer in the original statute, represents a significant departure from existing practice. We agree, and we believe it was an intentional departure on the part of Congress, based on a belief that the officer, normally an administrative law judge with a fair measure of independence from the agency, might well be less biased then the agency in determining the substantial justification question in the fee case. In practice there seems to be no reason to believe that in most cases the agency would have ruled any differently than did the ALJ. H.R. 2223 contains

compromise language to give the agency the authority for final decision on fees--as it has always had for the case in merit--while the government relinquishes its right of appeal in fee award determinations. We are prepared to support this compromise langua-

H.R. 2223 also contains other amendments to correct unintended effects of the original statute, including clarification that Boards of Contract Appeals cases are covered under EAJA. We also support these amendments.

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Mr. MAZZOLI. Thank you very much, Ms. Douglas.

Mr. Stewart.

Mr. STEWART. Thank you, Mr. Chairman.

I would ask to note initially that I have been asked to state that the National Small Business Association and the Small Business Legislative Council are also joining in my statement, which was offered on behalf of Small Business United and the Small Business Legal Defense Committee.

Mr. MAZZOLI. You are wearing four instead of two hats. Is that right?

Mr. STEWART. Just as many as I can find.

I am reminded, in any event, of Mark Twain's famous remark that reports of his demise were greatly exaggerated. Unfortunately, with the Equal Access to Justice Act the reports of its demise were exactly accurate, and we are very pleased that this subcommittee and the sponsors of this legislation are taking the lead in trying to revive that bill.

Ms. Douglas has stated it well. We are extremely disappointed with the veto. I have stated in the prepared testimony our disagreement with the analysis the President offered. We found it, as I stated, pretextual—not persuasive. And we still are unable to understand the real motivations for the veto.

We are willing to move on, though. The veto is history at this point. H.R. 2223 is good legislation, and we are very pleased with it.

I want to focus on several features of it, just quickly. I don't want to repeat testimony. But, first, on the position of the United States, the language and the interpretation adopted by the Third, Eighth, and Ninth Circuits Courts of Appeal, which is that the position of the United States has to be evaluated in terms of the underlying action of the agency, is adopted by this legislation. That is very important. It provides that the bill really will focus on Government action rather than Government litigation positions.

Second, private parties will have the right to appeal from an adverse agency fee decision and the Government will not have such a right. That is, again, an important point. It has been our experience that in the agencies the private parties simply do not stand a chance—they never get fees. For the first 2½ years there were 8 awards out of over 200 claims. And there was no appeal right at that time. You had to get leave to appeal and then the standard of review was abuse of discretion. This is a very substantial improvement, and we applaud it.

Third, the retroactivity to October 1, 1984, is obviously critical. Some people have been left holding the bag, basically, by the President's veto, and we think it only right that they not have to suffer.

Finally, that Boards of Contract Appeals proceedings will be squarely covered.

One point I do want to mention which has been the subject of questioning by Mr. Moorhead and the chairman does focus on the language in section 2(b) of the bill. The language does state that the finding of substantial justification will be based on the record that has been made.

I have understood in reading the bill that it presents a broad use of the term "record." This is of because the way these cases often

arise. The most meritorious fee claims are often in cases where the Government settles the case before there is really any litigation to speak of.

When the Government does that, there is no record made, by and large, and you will not have a hearing transcript, you will not have formally marked and numbered exhibits, documentary exhibits. And the district judge who then has to make a decision as to award fees has very little to go on.

When I first read Ms. Kuhl's testimony this afternoon, and I would focus on the fourth page of her prepared statement, she said, "Under this provision, the court would decide the substantial justification question based on the record, including affidavits filed by both sides."

I understood from that that she was taking the same position that I do, which is that you can expand the record in the fee proceeding in those circumstances where you have a very small record, and it would be necessary to.

Now, when I heard her oral testimony today, I am not so sure I was right about their position. But I think it is something that this subcommittee may well want to take a look at. And I think it was well stated by Mr. Moorhead that there may well be instances in which the Government is going to want to expand the record to make its case. I do not present a purely partisan claim here, it is really a lawyer's question. And I think district courts could well find themselves without really a sound basis for coming to a decision if "record" is to be construed narrowly. It will lead to litional litigation, I think, and that is undesirable in all events.

With that one issue flagged, we do heartily endorse this legislation. We would like it speedily enacted and applaud members of the subcommittee for working so hard on it, and the staff.

[The statement of Mr. Stewart follows:]

Statement In Support Of H.R. 2223

By David O. Stewart
Miller, Cassidy, Larroca & Lewin

Representing Small Business United
and the Small Business Legal Defense Committee

Subcommittee on Courts, Civil Liberties and the
Administration of Justice of the
House Judiciary Committee

April 29, 1985

H.R. 2223, the proposed revival of the Equal Access to Justice Act ("EAJA"), should be enacted as soon as possible. The EAJA was permitted to expire last October 1, even though members of this subcommittee, and others in the House and Senate, had worked hard to extend and improve the statute. As we all know, after reauthorization was unanimously approved in mid-October, President Reagan vetoed the legislation.

The veto message is a baffling document. The purported reasons for the veto were confusion over the calculation of interest on late payments of fee awards, and the supposed danger that fee claimants would conduct extensive discovery into agency decision-making processes. The first purported problem is plainly a minor one, easily remedied by technical amendment. The second purported problem, in my view, is so unlikely and insignificant that it resembles a pretext for the veto, not a viable reason for the veto.

Unlike other witnesses before this subcommittee, I am a practicing trial lawyer in private practice. I spend a substantial amount of my time in discovery activities, sometimes against the federal government, and I also have some familiarity with litigation over fees. In my experience and judgment, a private party which has just won a case against the federal government has little or no interest in pursuing discovery on fee-related issues. The expense of discovery in the fee proceeding could hardly ever be justified. To satisfy the EAJA's substantial justification standard, the fee claimant in a fully-

litigated case can point to a complete trial record. In a case which has been resolved by settlement, the fee claimant can point to the government's concession that he was right. The incentive for discovery by the fee claimant is, at most, nominal.

Moreover, the government can -- and does every day in other cases -- assert executive privilege, attorney-client privilege and deliberative privilege to block inappropriate discovery requests. Those privileges would be fully applicable to fee proceedings and the courts have been sympathetic to such assertions of privilege.

Finally, it must be noted that the federal government itself makes liberal use of discovery procedures in attorney fee proceedings. An example of such government discovery arose in League of Women Votes v. FCC, No. CV 79-1562-MML(PX) (M.D. Cal.). In that case, the Supreme Court struck down as unconstitutional a law which prohibited editorials on public broadcasting stations. The government then demanded in the fee proceeding all documents reflecting all of the expenses of the law office -- including "salaries, rent, supplies, subscriptions, utilities, insurance, and depreciation" -- as well as all documents reflecting the membership of the League of Women Voters and its relationship to any other League of Women Voters' organization.

Without knowing more about that case than I do, I cannot judge whether the government's discovery demands were reasonable or not under the circumstances. The fee claim was

rejected on legal grounds before such grinding discovery could commence. My point is simply that it is the government -- not fee claimants -- which most often seeks burdensome discovery in fee proceedings. This conclusion is consistent with the ordinary patterns of litigation: those who have the money are content to engage in discovery; those seeking to win some money press for a prompt decision.

For all of these reasons, the veto message remains a notably unpersuasive document. Fee claimants have little incentive or inclination to engage in discovery, the courts have ample tools for controlling improper discovery, and it is the government which most often pursues discovery in fee proceedings.

I am not here, however, only to lament the unfortunate history of the EAJA. I, and the organizations I represent, applaud the sponsors of H.R. 2223. It is sound legislation, unfortunately more than seven months overdue, and should be enacted with speed. The bill contains the following admirable improvements of the now-defunct statute:

(1) It requires that the agency action or failure to act which gave rise to the litigation must be substantially justified. This provision thereby ratifies the decisions in the Third, Eighth and Ninth Circuits that "position of the United States" includes the underlying action of the agency.

(2) Private parties will have the right to appeal from adverse agency fee rulings and the agency will have no right of appeal, which would be redundant for the agency anyway.

(3) The statute is to be retroactive, applying to all cases filed since the EAJA expired on October 1, 1984.

(4) Proceedings before the various boards of contract appeals are explicitly covered.

Amidst this applause, I also must note one point concerning Section 2(b) of the bill. As I understand that provision, a fee claimant may address the substantial justification issue by presenting arguments and other evidence concerning the agency's action or failure to act. I note in particular the use of the word "record" in that section. The term plainly is used in a non-technical manner, so a fee claimant would not be limited to a formal court or agency hearing record (transcript and exhibits) when seeking an award of fees. Such a broad understanding of the term is mandated by the structure of the statute. For example, an EAJA fee claimant would have to rebut any agency showing that its "failure to act" was substantially justified. Yet there would never be a formal hearing "record" of an agency's failure to act. Consequently, the term "record" in section 2(b) reaches broadly to include all

relevant evidence, not merely a hearing transcript and associated exhibits.

It falls to this subcommittee, and to Congress as a whole, to redeem the promise of EAJA to small business people and individuals. The law has been a worthy one and it has enjoyed the complete support of Congress. Many in the private sector have worked with the staff of this subcommittee, and recently with the Administration, to bring the EAJA back to life after its untimely demise. H.R. 2223 is the fruit of those efforts. Again, we applaud the sponsors of H.R. 2223 and urge that the bill be speedily enacted.

Mr. MAZZOLI. Thank you. I yield myself 5 minutes for questions.

Let me thank all of you for being so swift and prompt with your testimony, you didn't waste time, you kept well within the rules and tenets of the subcommittee. We thank you.

Let me just ask a couple of quick questions. I had written down the word "settlement" here to remind me that something I think Ms. Douglas talked about. When there has been a settlement and when there hasn't been a full-fledged litigation, or there has been a settlement before you get too far into it, it is true that you may have a very scant record. If that is the only thing you look at, it may be hard to justify certain claims, which leads to what Ms. Aron had said earlier. That is maybe discovery needs to be broadened in some fashion.

Not having been involved in any of these cases at all since the law and not much litigation even before that, is it an absolute impossibility, or are you all just putting the best face on it? Would you really have to go too far afield than simply statements or affidavits as was said?

Let me start with Mr. Stewart and work across. Yes?

Mr. STEWART. In order to make your case in the fee proceeding, there could be very rare cases where you would want to indulge in discovery as a private party. I have never seen one. And I have never seen one where I thought that the privilege that the Government would assert could be beaten. But maybe there is, I don't know. I can't really address that.

Very frequently in a settlement type situation, there are going to be factors you want to bring to the court's attention, and you could by affidavit, stating that these documents represent what the actions of the Government were as to which we had brought the suit.

To be honest, most often when you have got a good fee claim, it is the kind of case the Government wants to settle, and the Government will settle to reduce its liability. And that's exactly the claim as to which you will have the smallest record. So what is being potentially done here, is to take the strongest claims and to give them the weakest possible record on which to make a fee claim.

You get into a situation where either the presumption is going to have to be indulged by the court one way or another: Either there is no record, so the Government must have messed up; or there is no record, so I have to assume the Government was right. Either approach seems unsatisfactory to me, and that's my reaction.

Mr. MAZZOLI. Ms. Douglas, can you help me a little bit with that, just generally?

Ms. DOUGLAS. Mr. Chairman, I am not a lawyer so I can't speak to the issues as Nan and David can. I will say that in most of the decisions that have been rendered so far regarding settlements, the basis of denying fees has been that the Government has taken a reasonable position in settling. With the expansion of the definition of final judgment, with the expansion or clarification, I should say, of the definition of position of the United States, we may very well have a situation where in report language we can clarify that the courts are being encouraged to look beyond a very narrow construction. I think it should be able to be handled fairly easily.

Mr. MAZZOLI. Thank you.

Ms. Aron.

Ms. ARON. As I stated, and in my conversations with public interest lawyers, in the past, they have rarely sought additional discovery at the fee stage in the proceedings. I do think there may be instances where additional discovery should be obtained, particularly when new information is obtained by the parties.

Mr. MAZZOLI. On the question of substantial justification, not the fee for it.

Ms. ARON. That's right. On the question of substantial justification, if there are memos, for instance, that have been prepared between Members of the Senate and executive heads of agencies that are not privileged and therefore unobtainable, that may have some bearing, it would be useful to obtain copies of them.

Mr. MAZZOLI. Someone said, I think, eight cases out of 200. Was that Mr. Stewart? Is that correct?

Mr. STEWART. That is in agency proceedings, and it is a raw number. I don't have the notes in front of me. As opposed to court proceedings, where we have done a bit better, and the private parties have won about 30 to 35 percent of the time.

Mr. MAZZOLI. Have you experience of how far they have had to go in discovery to make a substantial justification against the question of the amount of fees?

Mr. STEWART. In my experience, on substantial justification, I am not aware of any discovery ever. I am aware of several horror stories with respect to Government instigated discovery. One in particular, in the NLRB, a case out of Ohio, involving a uniform company—Lion Uniform—where they conducted a 4-day hearing into whether the company had assets over $5 million. They had accounting experts on the stand for days and days, and the administrative law judge finally ruled that even indulging and accepting every argument offered by the Government, the net worth of the company was still less than $5 million. That was a $90,000 proceeding. The Government got hit for 90 grand under the EAJA for running that proceeding.

My strong feeling here is that the shoe is really on the other foot. It is the Government that is killing people in discovery and not the private parties.

Mr. MAZZOLI. I asked Ms. Kuhl when she was here about the fee limits and hourly limits, and so forth. The two lawyers, at least, might address this. Ms. Aron, have you had any experience with the $75 cap which I assume is the law? Is that sufficient in most cases to reasonably reimburse people who have shown that the Government was not substantially justified in proceeding?

Ms. ARON. I think within the confines of the Equal Access to Justice Act, it has worked well, and it has been appropriate. I should add that some courts have awarded fees in excess of $75 an hour in cases where the litigation was complex and protracted and required lawyers of the highest quality. Applying additional factors to the $75 limit makes sense in this context.

I do very much oppose fee caps in a legal—

Mr. MAZZOLI. OK.

Mr. Stewart, have you had any experience with that?

Mr. STEWART. I have. I can't endorse it. I don't think it is a good idea. I would note for the record, however, that it is $75 plus a cost-

of-living adjustment. So, right now it is around $83 to $85 an hour, which is getting a little closer to real life. And I think if you compare the Attorney General's legal fees you get a feel for what legal fees in the real world are like, and they are not $75 an hour, by and large.

Mr. MAZZOLI. My last question and then I will yield to my colleagues for 5 minutes. Essentially, do you have any reaction—let me start with Ms. Aron and work across—as to whether or not the existence of the Equal Access to Justice Act has either prevented the Government as a deterrent from going forth with an unfounded wrongful action or whether it has acted, as some would say, as a chilling effect in the Government going forth with a proper action? How do you see this existence of the Equal Access to Justice Act since 1981?

Ms. ARON. It has been brought to my attention that there are some agencies that say they have been chilled in their enforcement ability by virtue of the Equal Access to Justice Act. But, overall, my thinking is that it's the governmental policy and the administration's positions on issues that have chilled government activity and Government enforcement and not the existence of this act.

Mr. MAZZOLI. Thank you. Ms. Douglas, have you seen any effect of the Equal Access to Justice Act?

Ms. DOUGLAS. We have been told again on the flip side of it that in terms of arbitrary enforcement, agencies have been told by their heads to cool it.

Mr. MAZZOLI. To be more careful?

Ms. DOUGLAS. "There is something out there and we don't want to have to pay fees," so apparently it is having that intended effect.

Mr. MAZZOLI. Mr. Stewart.

Mr. STEWART. Any evidence I have is purely anecdotal. I have always viewed the statute much more as a matter of individual justice to the person who has been subjected to an inappropriate regulatory action. There are so many factors that operate on a Government decision, it is very tough to attribute one decision to a particular statute.

Mr. MAZZOLI. My time has expired. The gentleman from Connecticut is recognized for 5 minutes.

Mr. MORRISON. Thank you, Mr. Chairman.

I would like to ask each of you to comment very briefly. Do you think that this act in its current form responds sufficiently to the administration's real reasons that it is likely to be signed?

Ms. DOUGLAS. That is a very difficult question to answer because none of us are representative of the administration.

I think that the Department of Justice would not have spent the last 7 months trying to work out a compromise if they didn't have a very good understanding that the President has a commitment to reauthorization and they had better work it out. I think both parties have given, and it stands neither side in good stead to just stand our ground completely and say, well, we don't agree, we don't agree. In fact, in some respects, I would say that the language that has been developed in 2223 is a significant improvement over what was in 5479, although the basic concept is the same.

We have reason to believe that in its present form the administration would sign this bill, yes.

Mr. MORRISON. Anyone else want to hazard a comment on that?

Mr. STEWART. I have nothing other than Ms. Kuhl's testimony and she says they support it.

Mr. MORRISON. OK.

In the bill that passed the House last time, there was included a provision which made clear that social security claimants who prevailed on a motion to remand were entitled to fees, and that is not in H.R. 2223 at this point, and I would just like a comment from each of you as to whether you see any inconsistency between providing that protection for social security claimants and the other purposes and the other protections that are in this legislation.

Mr. STEWART. I think there was an inconsistency even in that legislation for social security remands, which was that other remands involving other agencies were not covered. I have an intimate view of that right now because in my law firm we have won a procedural appeal and we are now going back on remand, and I know under the current law we will not get fees. I think that's wrong. I think when you win on a procedural point you should get fees.

The position taken in the Social Security context, which you refer to, in the last bill was correct as a matter of law in my view, and as a matter of policy, I don't think it is going to fly. We have talked about it, and as a result we are supporting this current bill.

Mr. MORRISON. So you are saying, really, you think that there ought to be a remand rule of that sort for all proceedings on the merits, leaving aside your judgment of the politics?

Mr. STEWART. That makes sense to me as a lawyer, yes, sir.

Mr. MORRISON. And when you say you don't think it is going to fly, who is it that is going to shoot it down? The administration or somebody else?

Mr. STEWART. I think we have a proven track record that this can be shot down.

Mr. MORRISON. You mean that it can be vetoed or you mean that this——

Mr. STEWART. I think it can be vetoed. I also think it would create a great deal more opposition within Congress.

Mr. MORRISON. You are talking about the Senator from Louisiana.

Ms. DOUGLAS. Committee jurisdiction.

Mr. MORRISON. Well, actually, this did not create committee jurisdiction problems over here, it did in the Senate last time, as I understand it.

Now, committee jurisdiction, would that be affected if there were a general remand provision? Is there a reason not to do that?

Mr. STEWART. I haven't explored that, but I simply don't think the kind of fast passage which is needed here and which is expected, could in any way reasonably be anticipated with that kind of provision.

Mr. MORRISON. I just don't understand why—I know intimately the politics of the last time. I am asking only the general remand provision in a sense doesn't invoke anyone else's jurisdiction.

Ms. DOUGLAS. I think that probably there are members of other committees who would say that it invokes their jurisdiction and

that they would grab it. I can see your point in terms of consistency and I also see David's point.

The difficulty is that you do have some members, for example, on the Ways and Means Committee, who are quite upset at the thought that this bill would contain anything expanding coverage and social security cases. And I believe that they have expressed to us a desire to look at it, as well as Members of the Senate Finance Committee.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Georgia is recognized.

Mr. SWINDALL. I have no questions, Mr. Chairman.

Mr. MAZZOLI. On that basis, would the gentleman from Connecticut seek to pursue the line of questioning? I have no questions myself.

Mr. MORRISON. No; that's fine.

Mr. MAZZOLI. Thank you.

Ladies and gentlemen, thank you very much for the help and the good testimony.

This committee stands adjourned.

[Whereupon, at 3 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX I (A)

TITLE II—EQUAL ACCESS TO JUSTICE ACT

Equal Access to Justice Act.

SEC. 201. This title may be cited as the "Equal Access to Justice Act". 5 USC 504 note.

FINDINGS AND PURPOSE

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. 5 USC 504 note.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 203. (a)(1) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties 5 USC 504.

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. Application for fees and expenses, submittal.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

"(b)(1) For the purposes of this section— Definitions.

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

5 USC 551.

"(B) 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(cX3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(cX3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

26 USC 501.

"(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

5 USC 554.

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

Applications, uniform procedures.

"(cX1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(dX3) of title 28, United States Code.

Fee determination, review.

"(2) A party dissatisfed with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years. Appropriation authorization.

"(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.". Report to Congress.

(2) The table of sections of subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(b) Section 202 of the Act entitled "An Act to amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes" approved June 4, 1976 (15 U.S.C. 634b), is amended—

(1) by striking out "and" after the semicolon in paragraph (9);

(2) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new paragraph:

"(11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5 of the United States Code.". Ante, p. 2325.

(c) Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsection (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal. Repeal. 5 USC 504.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States 28 USC 1920.

shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Judgment payments.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

28 USC 2414, 2517.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Fee and expense applications, submittal.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

Awards, reduction or denial.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

Definitions.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the

highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Ante, p. 2325.
41 USC 601 note.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

28 USC 2414, 2517.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

Appropriation authorization.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

Report to Congress.
28 USC 604.

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

28 USC 2412.

TECHNICAL AND CONFORMING AMENDMENTS

Repeal.
28 USC app.

SEC. 205. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,".

26 USC 1.

EFFECT ON OTHER LAWS

28 USC 2412 note.
Ante, p. 2327.

SEC. 206. Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

LIMITATION

5 USC 504 note.

SEC. 207. The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

EFFECTIVE DATE AND APPLICATION

5 USC 504 note.

SEC. 208. This title and the amendments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

Ante, p. 2325.

APPENDIX I (B)

H.R. 5479

Ninety-eighth Congress of the United States of America

AT TH[illegible]ND SESSION

Begun and held at the City of Washington on Monday, the twenty-third day of January, one thousand nine hundred and eighty-four

An Act

To amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 504(a)(1) of title 5, United States Code, is amended—

(1) by striking out "as a party to the proceeding", a.

(2) by adding at the end thereof the following: "The decision of the adjudicative officer on the application for fees and other expenses shall be the final administrative decision under this section."

(b) Section 504(a)(2) of title 5, United States Code, is amended by adding at the end thereof the following: "When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.".

(c) Section 504(b) of title 5, United States Code, is amended—

(1) by amending paragraph (1)(B) to read as follows:

"(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;";

(2) in paragraph (1)(C)—

(A) by inserting "(i)" before "an adjudication under";

(B) by inserting before the semicolon at the end thereof the following: ", and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)"; and

(C) by striking out "and" at the end thereof;

(3) by striking out the period at the end of subparagraph (D) and inserting in lieu thereof "; and"; and

(4) by adding at the end thereof the following:

"(E) 'position of the agency' includes the underlying action which led to the adversary adjudication; except that fees and expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.".

(d) Section 504(c)(2) of title 5, United States Code, is amended to read as follows:

"(2) If a party or the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party or the United States (as the case may be) may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on all appeals heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.".

(e) Section 504(d) of title 5, United States Code, is amended to read as follows:

"(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.".

(f) Section 504 of title 5, United States Code, is amended by adding at the end thereof the following:

"(f) If complete payment of the fees and other expenses awarded under this section is not made within 60 days after the final agency action making an award of such fees and other expenses, interest shall be paid on the amount remaining due. Such interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), and shall run from the date which is 61 days after the date of such award up to and including the date such payment is posted by certified or registered mail.".

SEC. 2. (a) Section 2412 of title 28, United States Code, is amended—

(1) in subsections (a) and (b) by striking out "or any agency and any official of the United States" each place it appears and inserting in lieu thereof "or any agency or any official of the United States"; and

(2) in subsection (d)(1)(A) by inserting ", including proceedings for judicial review of agency action," after "in tort)".

(b) Section 2412(d)(2) of title 28, United States Code, is amended—

(1) in subparagraph (B)—

(A) in clause (i) by striking out "$1,000,000" and inserting in lieu thereof "$2,000,000"; and

(B) by striking out "(ii)" and all that follows through the end of the subparagraph and inserting in lieu thereof the following: "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a)

of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;";

(2) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following:

"(D) 'position of the United States' includes the underlying agency action which led to the litigation; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

"(E) 'civil action brought by or against the United States' includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

"(F) 'court' includes the United States Claims Court;

"(G) 'final judgment' means a judgment that is final and not appealable; and

"(H) 'prevailing party', in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.".

(c) Section 2412(d)(4) of title 28, United States Code, is amended to read as follows:

"(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise.".

(d) Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following:

"(f) If complete payment of the costs or fees and other expenses awarded under this section is not made within 60 days after the award of such costs or fees and other expenses, interest shall be paid thereafter on the amount remaining due. Such interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), and shall run from the date which is 61 days after the date of such award up to and including the date such payment is posted by certified or registered mail.".

SEC. 3. Section 206 of the Equal Access to Justice Act is amended—

(1) by striking out "Nothing" and inserting in lieu thereof "(a) Except as provided in subsection (b), nothing"; and

(2) by adding at the end thereof the following:

"(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if any fees collected by the claimant's attorney or withheld for such attorney pursuant to such section 206(b) are refunded to the claimant insofar as the fees relate to the same work for which the

claimant's attorney is awarded fees under section 2412(d) of title 28, United States Code.".

SEC. 4. Section 203(c) of the Equal Access to Justice Act (Public Law 96-481) is repealed.

SEC. 5. Section 204(c) of the Equal Access to Justice Act is repealed.

SEC. 6. Section 207 of the Equal Access to Justice Act is repealed.

SEC. 7. Section 208 of the Equal Access to Justice Act is amended by adding at the end thereof the following: "Awards may be made for fees incurred before October 1, 1981, in any such adversary adjudication or civil action.".

SEC. 8. (a) Except as otherwise provided in this section, the amendments made by this Act shall be effective as of October 1, 1984, and shall apply to cases pending on such date.

(b) The amendments made to section 504(b)(1)(C)(ii) of title 5, United States Code, by subsection (c)(2) of the first section of this Act, and the amendments to section 2412(d)(2)(E) of title 28, United States Code, made by section 2(b)(3) of this Act shall apply to any adversary adjudication which was pending on or commenced on or after October 1, 1981, in which applications for fees and expenses were timely filed and were dismissed for lack of jurisdiction.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

APPENDIX I (C)

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of H.R. 5479, a bill "to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes."

H.R. 5479 would permanently reauthorize and make a number of significant changes to the Equal Access to Justice Act. The Act allows the award of attorneys' fees to certain parties who successfully litigate against the government unless the government demonstrates that its position is substantially justified or that special circumstances exist that make a fee award unjust. Because the Equal Access to Justice Act expired on September 30, 1984, legislation is needed to reauthorize the Act.

I am firmly committed to the policies underlying the Equal Access to Justice Act and will make the permanent and retroactive reauthorization of the Act a high legislative priority of the Administration in the next Congress. Where the Federal government has taken a position in litigation that is not substantially justified, and thereby has caused a small business or individual to incur unnecessary attorneys' fees and legal costs, I believe it proper for the government to reimburse that small business or individual for those expenses. The Equal Access to Justice Act thus serves an important salutory purpose that should become a permanent part of our government. Unfortunately, H.R. 5479 makes certain changes to the Equal Access to Justice Act that do not further the Act's basic purposes and that are inconsistent with fundamental principles of good government. The most objectionable of these provisions is the change the bill would make in the definition of "position of the United States." Under this changed definition, the Act would no longer apply only to the government's position taken in the administrative or court litigation, but would extend to the underlying agency action. This would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice. In addition, this change could also undermine the free exchange of ideas and positions within each agency that is essential for good government.

For example, this change would require courts in making fee determinations to examine the conduct of agency even where that conduct is not at issue in the court's review of the merits of the case before it. This would mean that a fee proceeding could result in an entirely new and subsidiary inquiry in the circumstances that gave rise to the original lawsuit. This inquiry only could lead to far lengthier proceedings than required if the court is merely to examine arguments made in court, but also could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. In effect, every step of the agency decision-making process, at whatever level, could become

MORE

(OVER)

the subject of litigation discovery. Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreements or reservations would be the subject of discovery and judicial inquiry.

In addition, H.R. 5479 contains a provision that would require the United States to pay interest on any awarded attorneys' fees not paid within 60 days after the date of the award. As noted by the Comptroller General of the United States, this provision would give lawyers who have received awards under the Act more favorable treatment than any other group entitled to interest payments from the United States. I agree with the Comptroller General that to the extent any interest should be paid under the Act, it should be paid on the same basis as other interest payments made by the government on court judgments.

The Department of Justice, the Office of Management and Budget, and other concerned agencies have repeatedly expressed to the Congress their serious reservations about these and other provisions of H.R. 5479. I wholly support the prompt reauthorization of the Equal Access to Justice Act and believe that the reauthorization should be retroactively effective to October 1, 1984. In light of the permanent nature of a reauthorization, such a reauthorization should include modifications and improvements in the Act, which the Administration is willing to explore with the Congress.

Concurrently with this memorandum, I am issuing a memorandum to all agency heads concerning the Equal Access to Justice Act. This memorandum reaffirms my strong commitment to the policies underlying the Act and instructs agency heads to review the procedures of their agencies to ensure that agency positions continue to be substantially justified. Special attention is to be given to those agency positions that affect small businesses. In addition, each agency is to accept and assist in the preparation of fee applications which can be considered once the Act is reauthorized.

I look forward to approving an acceptable reauthorization of the Equal Access to Justice Act early next year. For the reasons indicated, however, I am compelled to withhold my approval of H.R. 5479.

RONALD REAGAN

THE WHITE HOUSE,
November 8, 1984

# # #

APPENDIX I (D)

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release November 9, 1984

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

The authorities or the Equal Access to Justice Act (Title II of Public Law 96-481) expired on September 30, 1984, for all cases initiated after that date. While I strongly support the reauthorization of the Act and have worked closely with the Congress to that effect, I have today withheld my approval of the recently passed bill (H.R. 5479) reauthorizing the Act because certain of its amendments are unacceptable to the Administration. It is my hope and expectation that an acceptable reauthorization of the Act will be passed by the Congress early next year and that this reauthorization will apply retroactively to covered cases initiated on or after October 1, 1984.

Pending the reauthorization of the Equal Access to Justice Act next year, I am directing all agency heads to take the following actions.

First, agency heads shall ensure that the appropriate offices and personnel in their agencies understand that the Administration remains firmly committed to the policies underlying the Equal Access to Justice Act and that the failure to obtain an acceptable reauthorization of the Act this year should in no way be interpreted as a reduction in that commitment. In this regard, agency heads shall again review the procedures used by their agencies to ensure that agency positions are "substantially justified" within the meaning of the Act. Special attention shall be given to those agency positions that affect small businesses.

Second, agencies shall accept and retain on file any applications for awards of fees and expenses pursuant to section 203 of the Act (5 U.S.C. 504) and shall continue to provide an appropriate assistance in making such applications. Agencies will not, of course, be in a position to rule on these applications until the Act is reauthorized, but otherwise shall continue to accept such applications and provide necessary assistance as if the Act were in force.

Third, as for awards relating to judicial proceedings under section 204 of the Act, agencies shall continue to accept and retain on file any demands for settlement of claims for such awards even though such claims (for cases initiated on or after October 1, 1984) cannot be filed in court until the Act is reauthorized. Once the Act is reauthorized, such claims shall then be reviewed by the agency in accordance with the terms of the reauthorized Act.

The above measures will ensure that the policies underlying the Equal Access to Justice Act will continue in effect until the Act is reauthorized and that the protections afforded to litigants by the Act -- particularly to small businesses -- will not be denied during the period between the Act's expiration and its reauthorization.

RONALD REAGAN

APPENDIX II (A)(1)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

February 7, 1985

The Honorable Robert Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties, and
the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier:

Gail Fogarty has asked us to send you our views on an issue raised by the Comptroller General concerning the interest provision of H.R. 5479, the Equal Access to Justice Act amendments passed by Congress last October and vetoed by President Reagan. She also invited us to raise any other concerns we have about prospective legislation to reauthorize the Equal Access to Justice Act. The views expressed in this letter are my own and those of the Office of the Chairman of the Administrative Conference; the Conference itself has never taken any positions concerning the Equal Access to Justice Act.

As you know, the interest provision in question would require the payment of interest on attorneys' fee awards remaining unpaid 60 days after the date of the award. In a letter to Judiciary Committee Chairman Rodino, the Comptroller General objected to this provision on several grounds: (1) the provision is unnecessary, because there is no documented history of delay in the payment of court-awarded costs and fees by the United States; (2) the 60-day "grace period" does not allow adequate time for processing by the Justice Department and GAO; (3) the interest provision may cause problems where the recipient of an award owes the government money which GAO is trying to offset against the award; (4) the provision would result in treatment for Equal Access awards inconsistent with that for other judgments against the United States (including attorneys' fee awards under other statutes), since interest is only paid on other judgments when the government has taken an unsuccessful appeal, and the rates of interest allowable are different.

It is difficult for me to respond directly to many of the points made by the Comptroller General, since they concern primarily the procedures applicable when awards are to be paid out of the permanent judgment appropriation (31 U.S.C. §1304). The fee award provision with which I am most familiar is 5 U.S.C. §504, providing for fee awards in administrative adjudications. Under this, and the similar provision for court cases in which the position of the United States is not substantially justified (28 U.S.C.

§ 2412(d)), awards are paid directly from agency budgets* and do not undergo the GAO certification process outlined in the Comptroller General's letter. The ramifications of providing for interest on awards of costs under 28 U.S.C. §2412(a) and fee awards under 28 U.S.C. §2412(b) are really beyond our expertise.

As to fee awards made when the government's position is not substantially justified, I am not certain whether obtaining prompt payment of awards has been a significant problem. The information we collect from agencies on awards made in administrative proceedings generally seems to reflect reasonably timely disbursements once an award decision has become final. However, this represents only a small fraction of the total awards under the Act, most of which have been made in court actions. We have no information as to how promptly these court awards are being paid.

As a matter of principle, the use of some form of interest provision to induce prompt payment of awards and discourage needless appeals seems like a good idea. How extensive the provision should be depends on Congress' goals. The interest provision of H.R. 5479 would, as the Comptroller General notes, give Equal Access to Justice Act awards more favorable interest treatment than other judgments against the United States, on which interest is payable only from the date a successful litigant files a copy of the judgment with the Comptroller General through the day before the date of affirmance in an appellate court. (No interest is payable when the government takes no appeal.) Whether such different treatment is appropriate is essentially a policy question, not a legal one.

If the goal is to discourage the United States from taking unmeritorious appeals for the purpose of delay, a provision parallel to the existing one for judgments would be adequate.** If this approach is selected, the interest should run from a date certain, as in H.R. 5479. (The judgment fund provision requires the party to file a judgment transcript with the Comptroller General; such a requirement might be a needless technical trap for the individuals and small businesses intended to benefit from the Equal Access to Justice Act, and the agencies will be aware of the existence of an award against them.) Such a provision might read as follows:

> If the United States appeals an award of fees and expenses made against it under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at . . . [the rate Congress selects], and shall run from the date which is 61 days after the date of such award up to and including the day before the date the award is affirmed.

* The Act provided that awards "may" be paid by agencies or from the permanent judgment appropriation; however, section 207 of the Act prohibited payment from the judgment appropriation unless a special appropriation was made for that purpose. H.R. 5479, as you know, provided for payment by agencies without reference to the permanent judgment appropriation.

** Since payments under 5 U.S.C. §504 and 28 U.S.C. §2412(d) are made by the agencies and not from the permanent judgment appropriation, I don't think a mere reference in legislative history to the interest provisions of 31 U.S.C. §1304, as suggested in the Comptroller General's letter, will ensure that interest is payable on these awards.

This language could be used in both 5 U.S.C. §504 and 28 U.S.C. §2412; in the latter section, it should be modified slightly to clarify whether Congress intends for the provision to apply to all awards under 28 U.S.C. §2412 (in which case it should refer to "costs, fees or expenses") or just to awards under 28 U.S.C. §2412(d) (in which case it should refer to "subsection d" instead "this section").

Congress may conclude, however, that payment of interest on fee awards is warranted even when there is no government appeal — perhaps because additional interest seems more appropriate when the government has taken a position that is not substantially justified than in other circumstances, or because Congress believes that the individual agencies that must pay Equal Access awards may be more reluctant to pay promptly than the General Accounting Office. In this case a provision like that in H.R. 5479 (but applicable only to awards made under 5 U.S.C. §504 and 28 U.S.C. §2412(d)) should be retained in any new reauthorization legislation. The 60-day period provided for payment in H.R. 5479 seems adequate; the Prompt Payment Act allows agencies only 30 days for payment of contractual obligations, and the extra 30 days here allows some time to decide whether to appeal the award before paying it. (Of course, a slightly longer period, such as 90 days, could be substituted if there is any question about agencies' ability to reach a decision on appeal and process the necessary paperwork within 60 days.) Minor revisions to the previous language could resolve other problems raised by the Comptroller General, such as the appropriateness of requiring posting by certified mail.

I hope these thoughts on the interest issue will be helpful to you. There are three other issues related to reauthorization that are of concern to me.

1. I believe that fees should be awarded when either the underlying position or the litigating position of the United States is not substantially justified, as H.R. 5479 provided. This approach better achieves the purposes of the Equal Access to Justice Act, and I believe the difficulty of determining the underlying position has been overestimated.

2. I am concerned about the elimination of agency review of fee award determinations by administrative law judges. This represents a major departure from traditional agency procedure and eliminates the customary means of providing consistency in agency decisionmaking.

3. A more technical point concerns the provision in H.R. 5479 for judicial review of fee decisions in administrative proceedings. This provision would apparently permit the court to grant an award when the adjudicative officer had denied one, or to change the amount of an award made, but not to deny an award when the adjudicative officer had granted one. This limitation on the court's reviewing authority seems unnecessary and, particularly if there is to be no agency review of adjudicative officers' decisions, unfair to the agency.

I am presently preparing a more complete statement of my thoughts on these issues and will forward it to you in the near future. Thank you for this opportunity to give you our views. Please feel free to contact me if I can be of any further assistance.

Sincerely,

Loren A. Smith
Chairman

cc: Gail Higgins Fogarty

APPENDIX II (A)(2)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

April 24, 1985

OFFICE OF
THE CHAIRMAN

Honorable Robert Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier:

As I mentioned in my letter of February 7 concerning the payment of interest on awards of attorneys' fees under the Equal Access to Justice Act, I would like to raise some issues that I hope your subcommittee will give some thought to as it considers legislation to reauthorize the Act. As you know, I have certain statutory consulting and reporting responsibilities with respect to implementation of the Act in administrative proceedings, and this experience has formed the basis for my views. I have two primary concerns: the reviewability of agency adjudicative officers' decisions on attorneys' fee applications, and the definition of the "position of the United States" that must be substantially justified in order to avoid an award of fees.

H.R. 5479, which was passed in the last Congress but vetoed by the President, provided that decisions by agency adjudicative officers (ordinarily administrative law judges) on applications for attorneys' fees in administrative proceedings would be final agency decisions, subject only to direct review in the courts of appeals and not to review at a higher level within the agency. I strongly believe that this provision should be deleted in new reauthorization legislation. Elimination of agency review of adjudicative officers' decisions represents a significant departure from the orderly patterns of agency decisionmaking reflected in the Administrative Procedure Act, and I don't believe it serves any necessary purpose.

Under the APA, it is the responsibility of Presidentially-appointed, politically accountable agency heads to make important decisions, in most adjudications as well as in other matters. The role of the administrative law judge is to prepare an initial or recommended decision so that the agency will have the benefit of the views of the person who actually heard the evidence. The agency is generally free to reach different conclusions as to either the facts or the law of the case, bringing the expertise and judgment of the agency head (or members) to bear on the record. In addition to assigning the ultimate responsibility for agency decisions where it belongs, with senior appointed officials, agency review provides a crucially important opportunity to ensure consistency in administrative decisions and correct legal and technical errors.

Under a provision like the one in H.R. 5479, Equal Access to Justice Act decisions would lose these important benefits of agency review. Moreover, elimination of agency review would produce the anomalous result that an adjudicative officer who does not have the final say on substantive issues in the case will nevertheless have the final say on whether the position of the agency as litigator in that case was substantially justified. An ALJ whose decision has been reversed or substantially modified may have great difficulty in reaching a correct decision on substantial justification based on the agency head's ruling in the case. Consider, for example, the likelihood that an adjudicative officer who found in favor of the agency but was reversed on review will determine that the agency's position was not substantially justified. To do so, the officer would have to cast his or her own initial decision in the case in a very negative light.

There is no reason to assume that responsible public officials appointed by the President and confirmed by the Senate will be so biased that they cannot fairly decide an application for attorneys' fees, when they are sufficiently impartial to render the underlying decision on which the fee application is based. Like adjudicative officers, agency heads are used to deciding cases in which agency employees appear as parties, and can be expected to do so fairly.

While it has been speculated that agency review of fee decisions may be one reason for the small number of fee awards in agency proceedings, in fact agency review has not been a significant factor. During the Act's three years, most fee decisions by agency adjudicative officers became final without any agency review, even though those agencies that have handled the largest number of EAJA applications at the administrative level - the Department of Labor, the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the National Transportation Safety Board -- have all permitted agency review of adjudicative officers' fee decisions. Of the cases in which the agency did review, only three resulted in reversal of the adjudicative officer's decision. In two of these cases, decisions granting awards were reversed on technical grounds (failure to meet the 30-day application deadline), and in the third, a decision denying an award was reversed because the agency did not agree with the ALJ's finding of substantial justification. Other agency reviews resulted in affirmances without opinion or in correction of technical or analytical errors that did not affect the outcomes. There simply is no evidence that agency review of fee decisions has created a problem for EAJA applicants.

Thus elimination of agency review would significantly depart from established agency procedure and remove the traditional opportunity for ensuring consistency and providing the input of policy-making officials, while accomplishing no real end. I strongly recommend against including such a provision in reauthorization legislation.

A smaller, related point concerns judicial review of fee decisions in administrative proceedings. The provision of H.R. 5479 dealing with this subject appeared to limit the issues reviewable to denial of a fee award and the amount of any fee awarded, i.e., the court could not reverse an adjudicative officer's finding that the position of the agency was not substantially justified. If Congress chooses not to permit agency review of fee decisions, this limitation on judicial review seems to be unnecessary and unfair to the agency. It is certainly possible that an adjudicative officer's finding of no substantial justification could be wrong, and a court is as well situated to make this determination as to make the converse one. The judicial review provisions of the reauthorization legislation should leave all issues open to judicial review on the same basis. Should Congress decide to permit agency-level review of fee decisions, of course, the agencies will not need access to judicial review except in those cases where the litigating agency and the deciding agency are not the same, since an agency will not seek review of its own

decisions. In this event, reauthorization legislation could provide that an agency may seek judicial review of an administrative fee decision whenever it could seek review of the underlying substantive decision in the proceeding.

The second issue I would like to raise concerns the meaning of the term "position of the agency" (or "position of the United States.") I strongly support your efforts to define the position that must be substantially justified to include the underlying events that led to the litigation as well as the position taken in litigation. As you know, in interpreting the Act, the courts have split on this question. While the statutory language and legislative history contain passages that will support each argument, I believe the original intent of Congress was to include both the litigating position and the underlying position, and I urge you to continue to support the inclusion of a provision reflecting this interpretation in reauthorization legislation.

The purpose of the Equal Access to Justice Act is to ensure that the cost of litigation does not prevent individuals and businesses who have been the targets of unjustified government action from opposing that action in court or agency proceedings. That purpose cannot be fully served if only the government's litigating position is considered in evaluating substantial justification, because then the government will be able to pursue actions it knows to be unreasonable or inadequately supported in the hope of intimidating the private party, knowing it can simply concede without penalty if that party chooses to fight the matter.

The courts considering this issue have observed that in most cases the litigating position and the underlying position will be the same - that is, the litigating position will be that the agency's substantive action or decision, or the facts alleged in the agency's complaint, are correct. In these cases, of course, the question becomes academic. But problems arise in cases where the government "voluntarily" provides much or all of the relief requested in settlement of a case that has not been litigated on the merits, and in cases where the government devotes its litigation strategy to technical defenses such as mootness, expiration of the statute of limitations, or failure to exhaust administrative remedies. Here, the "litigation position" - either the offer of settlement or assertion of the technical defense - is quite different from the underlying substantive position.

Courts that have adopted the litigation position approach have concluded that looking to the underlying action in cases like these is inappropriate. For example, in Spencer v. National Labor Relations Board, 712 F.2d 539 (D.C. Cir. 1983), the court reasoned that holding the government liable for fees when it promptly settles a case that should never have been brought will serve as a disincentive to settlement -- if it will be subject to a fee award based on its substantive position anyway, the government will conclude that it might as well litigate even a tenuous case. Similarly, the obligation to pay fees because its substantive position is unjustified may discourage the government from arguing a reasonable procedural defense that deserves a hearing.

On closer examination, these arguments simply don't hold up. Cases in which the government has so little support for its case that it must concede immediately or can mount only unsuccessful procedural defenses are exactly the ones which should never have reached litigation and for which the party who has had to resort to needless litigation should be compensated. The possibility of a fee award should not serve as a disincentive to settlement by the government in such a case, since the fees will be low at this early stage and much higher after the case is fully litigated. Instead, permitting the government to file a complaint (or wait for the other party to file a complaint) with no potential liability for fees simply gives the government more room to "play chicken" with the other party.

Similarly, if the government has a truly reasonable procedural defense to assert in a case, it will presumably do so in any event. If it prevails, after all, there will be no fee award regardless of whether the outcome rests on substantive or procedural issues. Moreover, a judge considering the "totality of the circumstances" (the formulation used by the 9th Circuit in considering both litigation position and underlying position, see Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984)) would presumably have some flexibility to take into account the assertion of a substantially justified procedural defense in determining the amount of a fee award.

Some defenders of the litigation position approach have raised a more practical consideration: the possibility that determination of the government's "underlying position" will itself require additional litigation, with discovery or even trial-type proceedings. While this concern is understandable, I think the extent of the potential problem has been overestimated. In cases where the merits have been reached, the underlying position and the litigating position will overlap significantly (if not completely), and the record should speak for itself. Even when cases have been dismissed, withdrawn, or settled, the resolution of the fee issue shouldn't ordinarily require extensive litigation. This is particularly true since the government both controls the evidence and has the burden of proof on substantial justification. In some cases, it may be appropriate for the government simply to concede its error and pay the fees. Where there is a legitimate issue, factual stipulations or affidavits of involved officials, perhaps with supporting documents, describing the evidence or legal theories on which they based their actions or decision to proceed, should generally be adequate to permit the judge to make a finding. Situations in which a real dispute arises over the government's underlying position, requiring some actual litigation of matters that would otherwise not be litigated, should be extremely rare. Moreover, if it is considered necessary, the risk of elaborate fee litigation could be reduced, either by clarifying that the government's underlying position includes only the substance of the decision, action, or inaction which caused the government or private party to bring suit (and not every subsidiary action or decision in the process), or by giving the judge or adjudicative officer broad discretion to restrict discovery related to fee petitions.

Those cases in which the distinction between the litigating position and the underlying position has made the difference may provide the best argument for considering both. One case that provides an excellent example is Del Manufacturing Co. v. United States, 723 F.2d 980 (D.C. Cir. 1983): when lengthy processing delays by the Small Business Administration resulted in the plaintiff's losing an opportunity to obtain an important Navy contract, it brought suit. At this point the Navy agreed to reopen the matter, and the SBA completed the necessary paperwork. The Del Company had to resort to litigation to vindicate its rights, and it was successful in doing so. Yet the D.C. Circuit, in overturning a district court fee award, would not even consider the sequence of events that forced Del to litigate because the government's litigation position was reasonable. Similarly, in Ashburn v. United States, 740 F.2d 843 (11th Cir. 1984); White v. United States, 740 F.2d 836 (11th Cir. 1984); and Alspach v. District Director of Internal Revenue, 527 F.Supp. 225 (D. Md. 1981), all tax cases (from the period when such cases were covered by the Act), the government, defending taxpayer refund actions, conceded some or all of the claims before trial. Nevertheless the taxpayers received no reimbursement for the expenses of the litigation necessary to vindicate their rights, because the concession was deemed a substantially justified litigation position. These cases demonstrate the problem noted by the 8th Circuit in Iowa Express Distribution, Inc. v. National Labor Relations Board, 739 F.2d 1305, 1309 (8th Cir. 1984): "The litigation position approach does not address what we must conclude is at least a significant purpose of the EAJA - to encourage government regulatory agencies only to take actions

that have a reasonable basis in law and in fact." Because I believe this regulatory reform aspect of the Act is important and should be preserved, I urge you to define the position of the United States to include the underlying position as well as the litigating position.

Thank you very much for your consideration of these issues. It has been a pleasure working with you and your staff on issues of common interest in the past, and I hope you will call on me to provide any assistance you may need on this or other matters in the future.

Sincerely,

Loren A. Smith
Chairman

APPENDIX II (A)(3)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

July 17, 1985

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Pursuant to the provisions of 5 U.S.C. 504(e), I have the pleasure of transmitting herewith the third annual report on agency activities under the Equal Access to Justice Act.

Sincerely,

Loren A. Smith
Chairman

Enclosure

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
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OFFICE OF
THE CHAIRMAN

REPORT OF THE CHAIRMAN

OF THE

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ON

AGENCY ACTIVITIES UNDER

THE EQUAL ACCESS TO JUSTICE ACT

OCTOBER 1, 1983 - SEPTEMBER 30, 1984

Loren A. Smith
Chairman

July 16, 1985

REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT

The Equal Access to Justice Act (Title II of Pub. L. 96-481, 94 Stat. 2325), which provides for the award of fees and expenses to certain litigants who prevail against the United States in adversary agency adjudications or civil proceedings[1], directs the Chairman of the Administrative Conference of the United States to report annually to Congress on the amount of attorney fees and expenses awarded in agency adjudications under the Act, providing information about the individual awards and the proceedings in which they were made that may be helpful to Congress in evaluating the scope and impact of the Act. 5 U.S.C. §504(e). This is the third annual report of the Chairman under the Act, covering the period from October 1, 1983 through September 30, 1984.

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1 Under the Act, a prevailing party is entitled to an award of reasonable attorney fees (ordinarily limited to $75.00 per hour) and other expenses unless the United States can show that its position in the litigation was substantially justified. A fee award may be reduced or denied when the party seeking it has caused undue delay, or when special circumstances would make an award unjust. Parties eligible to apply for awards include sole proprietors, corporations, partnerships, and public or private organizations with a net worth of not more than $5 million and not more than 500 employees, tax-exempt organizations under 26 U.S.C. §501(c)(3) and agricultural cooperatives under 12 U.S.C. §1141j(a) with not more than 500 employees, regardless of net worth, and individuals with a net worth of not more than $1 million. The Act does not apply to cases commenced on or after October 1, 1984; however, agencies are continuing to process fee applications filed in proceedings already pending as of September 30, 1984. At this writing, legislation to extend and amend the Equal Access to Justice Act has been passed by the United States House of Representatives and is pending in the Senate.

1984 Fee Applications

Fiscal 1984 saw a significant increase over previous years in the level of Equal Access to Justice Act activity in agency proceedings. Agencies received 147 applications for attorneys' fees during the year and disposed of 89, according to data submitted to the Administrative Conference. Thirteen applicants were awarded fees, while 76 applications were denied. (See Appendix I for data on Equal Access to Justice Act activity by agency.) In fiscal 1983, by contrast, 88 applications were filed, 8 awards were made, and 53 applications were denied. In absolute terms, however, this level of Equal Access to Justice Act activity is still quite low; agencies decide over 10,000 adversary adjudications per year.

As in previous years, the National Labor Relations Board ("NLRB") processed the largest number of fee applications under the Act in fiscal 1984, disposing of 33 applications. However, the Department of Health and Human Services received a greater number of new applications (52 to 46 for the NLRB) during the year. The two agencies' experience with the Act at the administrative level has been quite different; at the Department of Health and Human Services, the applications are generally filed in proceedings not covered by the Act and dismissed for that reason before the merits are reached. By contrast, in 32 of the cases decided by the NLRB, adjudicative officers wrote full opinions, granting three awards and denying the other applications for a variety of reasons. (In the other case, the adjudicative officer approved without opinion a proposed settlement granting an award to the applicant.) Sixteen cases were further reviewed by a three-member panel of Board members (exercising the delegated authority of the full Board).

Fee Awards

Thirteen awards of attorney fees totalling $121,943.79 were made in administrative proceedings in fiscal 1984. The awards were made against four agencies:

four against the Department of Labor (two in its own proceedings and one each at the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission), four against the Federal Aviation Administration ("FAA") (all made in proceedings before the National Transportation Safety Board), four against the NLRB, and one against the Securities and Exchange Commission ("SEC"). All the awards were made in enforcement-type proceedings, broadly defined (including license revocations, regulatory enforcement proceedings, unfair labor practice proceedings, and grant audit disputes). Recipients included ten individuals, nine small businesses, and an Indian tribe.[2]

The awards ranged from $400 (to an individual in a license suspension proceeding involving the FAA) to $48,300.00 (to two broker-dealers and five individuals in an SEC proceeding). Modest awards were far more common than those at the larger end of the scale, however; only three awards (two of approximately $15,000 each in addition to the SEC award) exceeded $9,000.00. (See Appendix II for information on the awards.)

Most claimants received less than the amount of fees they requested. The applicants who received $48,300 in settlement from the SEC had requested $283,775.60. Adjudicative officers declined to award fees for the total number of hours requested in five cases, for reasons including duplication of effort, lack of direct connection to the proceeding, and entitlement to an award for only some parts of a proceeding. In another case, the adjudicative officer reduced the hourly rate requested, awarding $55 per hour for a junior attorney instead of the requested $70. (While most awards were both requested and made at the statutory maximum of $75 per hour, attorneys in four cases submitted bills for at least some time (usually that of junior attorneys or law clerks) at lower rates.)

The fee award in one case before the Federal Mine Safety and Health Review Commission was reduced as a result of an eligibility problem. The adjudicative officer

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2 In two proceedings, more than one applicant shared an award; thus the number of recipients exceeds thirteen.

awarded $15,600.00 in fees for services rendered to the applicants, employees of a corporation too large to be eligible for an award, by an attorney who was also an employee of the corporation. (The company had agreed that it would not seek reimbursement for the services from the employees, regardless of the outcome, and that the attorney-employee could keep any fees awarded.) However, an additional sum requested for services performed by outside counsel retained by the attorney and paid by the corporation was denied on the theory that the services were rendered to the corporation, not the applicants.

Applications Denied

The 76 applications for fees denied in fiscal 1984 were rejected for a variety of reasons, with two reasons cited far more often than others. (See Appendix III.) The largest number of applications (40) was denied because the Equal Access to Justice Act did not apply to the particular proceeding. Thirty-one of these applications were filed with the Department of Health and Human Services in administrative proceedings under the Social Security Act. Another three were Interior Department cases in which adjudicative officers ruled that hearings required by the Due Process Clause of the Constitution are not necessarily hearings required by statute within the meaning of 5 U.S.C. §554.

The second most common reason for denying applications was a finding that the government's position was substantially justified, made in 26 cases. Twenty-one of these were NLRB cases. As in previous years, many of these cases turned on the fact that the underlying case involved the resolution of legitimate credibility questions.

Agency Review of Decisions

The impact of agency review of adjudicative officers' decisions on Equal Access to Justice Act applications has been a controversial issue because of concern about possible

agency bias against applicants. Of 58 decisions[3] in fiscal 1984, 31 were decided finally by the adjudicative officer, while in another 20 the adjudicative officer's decision was affirmed on agency review. Three were decided initially by agency heads or reviewing boards, and another four were disposed of by settlement or concession without decision. In no case did an agency head or reviewing body reverse an adjudicative officer's decision (although they occasionally modified the underlying reasoning somewhat). These figures are consistent with experience under the Act in previous years, during which only three cases which have been finally decided were reversed on agency review.[4] Two of these turned on jurisdictional grounds (failure to meet the 30-day deadline for filing applications); in the third, the agency reversed a decision denying an award.

3 Information on the identity of the decisionmaker was not available for the 31 cases decided by the Department of Health and Human Services; since these applications were all denied on grounds that the Act did not apply to the proceedings, it is unlikely that the relative roles of adjudicative officer and agency head significantly affected the outcome.

4 There are a few cases now pending at agencies in which the agency has reversed and remanded the case to the adjudicative officer, and in one Commerce Department case decided since the end of fiscal 1984, the agency (acting through its general counsel) reversed an adjudicative officer's decision to grant an award.

APPENDIX I

Agencies Receiving Applications for Awards of Fees and Expenses Under the Equal Access to Justice Act in Administrative Proceedings October 1, 1983 - September 30, 1984

Agency	Applications Received	Applications Granted[1/]	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on September 30, 1984[2/]
Department of Commerce	2	0	0	3[3/]
Commodity Futures Trading Commission	4	0	0	4
Environmental Protection Agency	1	0	0	3[4/]
Federal Communications Commission	1	0	1	0
Federal Labor Relations Authority	0	0	0	1
Federal Mine Safety and Health Review Commission	0	1	0	0
Department of Health and Human Services	52	0	31	38
Interior Department	3	0	4	2
Interstate Commerce Commission	0	0	0	1
Department of Labor	15	2	4	15
National Labor Relations Board	46	4	29	58
National Transportation Safety Board	8	4	3	6
Nuclear Regulatory Commission	0	0	0	1
Occupational Safety and Health Review Commission	7	1	2	10
Securities and Exchange Commission	5	1	1	3
Department of Transportation	2	0	1	1
United States Postal Service	0	0	0	1
TOTAL	146	13	76	145

Note: Multiple applicants in the same proceeding are counted as one when the agency disposes of their applications in a single order, as more than one when the agency disposes of their applications separately.

1/ Includes fee awards made by settlement.

2/ Includes back log of cases from previous year as well as pending FY 1984 filings; includes cases pending on agency review of an adjudicative officer's decision.

3/ Includes two cases in which decisions on agency review of the adjudicative officer's decision were issued early in FY 1985. In both cases, the agency denied the application, once affirming and once reversing the adjudicative officer's decision.

4/ Includes one case in which a decision on agency review of the adjudicative officer's decision was issued in early FY 1985. The agency affirmed the award of $71,243.17 to Robert Ross & Sons, Inc.

Equal Access to Justice Act
Awards of Fees and Expenses in Administrative Proceedings
October 1, 1983 - September 30, 1984

Applicant	Deciding Agency	Paying Agency	Type of Proceeding	Amount Requested	Amount Received
Aerospace Maintenance, Inc.	National Transportation Safety Board (NTSB)	Federal Aviation Administration (FAA)	license revocation	$21,813.36	$15,263.77
Russell Collins and Virgil Kelley	Federal Mine Safety and Health Review Commission	Department of Labor (DOL)	FMSHA enforcement	$28,739.31	$15,000.00
John E. Cutts	NTSB	FAA	license suspension	$400.00	$400.00[1/]
Debolt Transfer, Inc.	National Labor Relations Board (NLRB)	NLRB	unfair labor practice	$6,719.68	$6,008.18
Dun-Par Engineered Form	Occupational Safety and Health Review Commission	DOL	OSHA enforcement	$3,230.32	$2,969.97
Macotta Corporation	NLRB	NLRB	unfair labor practice	$15,657.03	$7,658.73
Stephen L. Miller	NTSB	FAA	license suspension	$5,027.44	$3,548.29
Pasqua Yaqui Tribe	DOL	DOL	job training grant dispute	$1,974.40	$1,974.40[1/]
Rapid Air Transport, Inc.	NLRB	NLRB	unfair labor practice	$7,249.23	$7,249.23
Rural America, Inc.	DOL	DOL	CETA audit	$4,830.00	$3,296.00
Joseph Sottile, Jr.	NTSB	FAA	regulatory enforcement	$8,101.22	$8,101.22
Specialty Waste & Wasteco, Inc.	NLRB	NLRB	unfair labor practice	unknown	$1,575.00[2/]
Wall Street West, Inc., General Bond & Share Co., and 5 individuals	Securities and Exchange Commission (SEC)	SEC	regulatory enforcement	$263,775.60	$48,300.00[2/]
				TOTAL	$121,943.79

1/ Application unopposed.

2/ Award made by settlement of the parties.

Appendix III

Reasons for Denial of Applications for Awards under the Equal Access to Justice Act in Administrative Proceedings

October 1, 1983 - September 30, 1984

	Number of Applications
Proceeding was not a covered "adversary adjudication"	40
Application was not timely filed	2
Applicant did not prevail	4
Applicant was not eligible	4
Government's position was substantially justified	26
TOTAL	76

Note: In a few cases, alternative reasons have been offered for denial. These cases have been counted as denials for the reason that would ordinarily be reached first. For example, if the application was not timely and the government's position was substantially justified, the denial has been listed as one for the former reason.

APPENDIX II (B)

REPORT BY THE DIRECTOR
OF THE
ADMINISTRATIVE OFFICE
OF THE
UNITED STATES COURTS
ON REQUESTS FOR FEES AND EXPENSES
UNDER THE
EQUAL ACCESS TO JUSTICE ACT OF 1980
JULY 1, 1984 THROUGH JUNE 30, 1985

L. Ralph Mecham
Director

September 18, 1985

REPORT OF FEES AND EXPENSES AWARDED UNDER THE EQUAL ACCESS TO JUSTICE ACT OF 1980

The Equal Access to Justice Act

The Equal Access to Justice Act, Title II of P.L. 96-481, 94 STAT 2325, lessens the financial burden on private parties who prevail against the U.S. in agency adversary adjudications or non-tort civil actions by authorizing the award of attorney fees and expert witness fees. The Act also covers outlays for any study, analysis, engineering report, test, or project necessary in building a case. To be eligible for such an award, the party must prevail and meet certain financial requirements of the statute. Even when the private party prevails against the U.S. and is determined to be financially eligible, the attorney fees and other expenses requested can be denied if the U.S. can demonstrate that its position was "substantially justified." Petitions for fees may also be denied if the court finds that the private litigant used delaying tactics or if special circumstances exist which would make an award unjust.

Reporting Requirement

This is the fourth report prepared in accordance with Title 28 U.S.C. Section 2412(d)(5), which requires the Director of the AO to include in his **Annual Report** the amount of fees and other expenses awarded by the Federal courts under Title 28 U.S.C. Section 2412(d) during the preceding fiscal year. The **Annual Report**, however, is prepared for the year ended June 30 not the fiscal year. Consequently, the first report only covered the period from the effective date of the Act, October 1, 1981 through June 30, 1982. Subsequent reports have provided data for an entire year (July 1 through June 30).

Amendments to Previous Reports

The courts of appeals reversed nine awards which were made by district courts during 1983. In still another case, Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985), the court affirmed the award but reduced it from $1,129,450 to $322,700. The district court had applied a multiplier of 3.5 to the amount requested by the petitioner to "properly reflect the complexity of the case." The court of appeals held that the Act contains no express authorization for the use of a multiplier and, therefore, a multiplier may not be applied. Table 35 provides revised totals for 1983.

Table 35
Decisions on Equal Access to Justice Act Petitions
During the Twelve Month Periods Ended June 30, 1982 Through 1985

	1982[1]	1983[2]	1984[2]	1985	Percent Change 1985/1984
Total Number of Petitions	33	141	296	562	89.9
Petitions Denied	22	93	130	155	19.2
Petitions Granted	11	48	166	407	145.2
Total Amount Awarded	$700,338	778,582	$1,617,211	$1,851,960	90.6

[1] Effective October 1, 1981 through June 30, 1982.
[2] Revised.

After the 1984 report was published, data were received on 19 additional fee determinations made prior to June 30, 1984. These cases are included in Table 35, raising the total number of petitions terminated during 1984 to 296. Federal courts granted 166 (56 percent) of the petitions, awarding a total of $1,417,211.

Analysis and Summary of 1985 Data

During 1985 Federal courts disposed of 562 petitions for attorney fees and other expenses, 90 percent more than in 1984. Over 80 percent (462) of these petitions were terminated in the U.S. district courts. Two districts, New York, Western (73) and Pennsylvania, Eastern (69) accounted for approximately one-fourth of all terminated petitions. Another 15 percent (85) were terminated in the U.S. courts of appeals. The Third Circuit reported the most activity, disposing of 20 equal access petitions. Fourteen petitions were terminated in the U.S. Claims Court and 1 was terminated in a bankruptcy court. Table 36 summarizes equal access data by type of court and agency.

Twenty-eight different government agencies were involved in at least one equal access decision. Nearly 80 percent involved the Department of Health and Human Services. The vast majority of these cases continue to involve litigation over the termination of disability benefits under the Social Security Act. Petitioners were awarded attorney fees in approximately 83 percent of these cases because the court found the Social Security Administration had terminated their disability benefits without substantial justification. The Internal Revenue Service was involved in 26 equal access decisions and the Department of Agriculture was involved in 11.

More than two-thirds (379) of the terminated petitions were original applications under Section 2412(d)(1)(A), after judgment in a civil case against the U.S. and one-fourth (147) were original applications under Section 2412(d)(3), after the court reviewed an agency decision on the merits of the case. Thirty-one were appeals of attorney fee decisions made by lower courts. In 22 of these cases, the court affirmed the lower court decision. Sixteen were denials of attorney fees and six were awards. The court of appeals did, however, reduce one of the awards. In the other nine cases, the court reversed the lower court decision. Cases remanded to lower courts for further proceedings are not included in this report.

Five petitions were for leave to appeal a fee determination made by an administrative agency under Title 5 U.S.C. Section 504(c)(2). Four of the five petitions involved the National Labor Relations Board. On two occasions the courts denied the petition for review. In the other three cases, the court granted the petition for review but affirmed the agency's denial of attorney fees.

Total Amount Awarded Increases

Federal courts granted 407 (72 percent) requests for attorney fees and expenses, awarding a total of $1,851,300 in 1985. This is not the amount actually received by successful petitioners, however, because the U.S. appeals most of the awards. The overwhelming majority of the total amount awarded (98 percent) was for attorney fees. The remainder was for expert witness fees ($13,812) and other expenses ($17,971) such as travel and photocopying.

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Table 36
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
During the Twelve Month Period Ended June 30, 1985

Court/Agency	Petitions	Petitions Denied		Petitions Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Total	563	155	3,763,134	407	2,310,375	1,851,300	1,819,517	-	13,813	17,971
U.S. Courts of Appeals										
Commodity Futures Trade Commission	1	1	19,195[2]	-	-	-	-	-	-	-
Dept. of Agriculture	3	1	-	2	87,000	55,000	55,000	-	-	-
Dept. of the Army	4	3	48,012	1	13,200	13,200	13,200	-	-	-
Dept. of Commerce	4	4	-[2]	-	-	-	-	-	-	-
Dept. of Health and Human Services	30	15	46,691	13	49,934	41,434	41,934	-	-	484
Dept. of Housing and Urban Development	5	3	176,500	2	2,400	2,400	2,400	-	-	-
Dept. of the Interior	4	3	117,233	1	8,825	8,825	8,825	-	-	-
Dept. of Justice	2	1	-[2]	1	15,000	15,000	15,000	-	-	-
Dept. of Labor	3	3	32,756	-	-	-	-	-	-	-
Dept. of Transportation	1	1	89,155	-	-	-	-	-	-	-
Environmental Protection Agency	1	1	12,500	-	-	-	-	-	-	-
Federal Aviation Admin.	2	2	42,253	-	-	-	-	-	-	-
Federal Emergency Management Agency	1	1	-[2]	-	-	-	-	-	-	-
Federal Energy Regulatory Comm.	3	1	58,066	2	23,065	18,000	18,000	-	-	-
Immigration and Naturalization Service	2	2	91,890	-	-	-	-	-	-	-
Internal Revenue Service	12	12	152,326	-	-	-	-	-	-	-
National Labor Relations Board	4	4	46,050	-	-	-	-	-	-	-
Nuclear Regulatory Comm	1	1	20,377	-	-	-	-	-	-	-
Securities Exchange Comm	1	1	30,441	-	-	-	-	-	-	-
Small Business Admin	1	1	-[2]	-	-	-	-	-	-	-
Supreme Court	1	1	-[2]	-	-	-	-	-	-	-
Tennessee Valley Authority	1	1	15,164	-	-	-	-	-	-	-
U.S. Claims Court										
Dept. of Agriculture	2	2	139,993	-	-	-	-	-	-	-
Dept. of the Air Force	2	2	15,960	-	-	-	-	-	-	-
Dept. of Defense	2	2	8,401	-	-	-	-	-	-	-
Dept. of Housing and Urban Development	1	-	-	1	27,240	15,933	15,933	-	-	-
Dept. of the Navy	2	1	4,248	1	70,180	9,344	9,344	-	-	-
Federal Aviation Admin.	1	1	110,775	-	-	-	-	-	-	-
Federal Commission on Paperwork	1	1	30,185	-	-	-	-	-	-	-
Internal Revenue Service	2	2	1,299,434	-	-	-	-	-	-	-
National Aeronautics and Space Admin.	1	1	-[2]	-	-	-	-	-	-	-

Table 38
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
During the Twelve Month Period Ended June 30, 1985
(continued)

Court/Agency	Petitions	Petitions Denied		Petitions Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
U.S. District Courts										
Dept. of Agriculture	8	2	23,890	4	121,384	121,384	121,225	-	-	79
Dept. of the Army	3	1	128,684	2	97,091	97,091	97,091	-	-	-
Dept. of Defense	1	1	10,799	-	-	-	-	-	-	-
Dept. of Energy	1	-	-	1	22,947	18,100	12,500	-	5,600	-
Dept. of Health and Human Services	422	62	313,886	388	1,292,319	908,193	896,180	-	2,475	9,538
Dept. of Housing and Urban Development	1	1	2,460	-	-	-	-	-	-	-
Dept. of the Interior	2	-	-	2	113,048	113,048	106,603	-	5,135	1,310
Dept. of Justice	3	-	-	3	29,946	5,106	4,892	-	-	214
Dept. of Labor	1	1	6,467	-	-	-	-	-	-	-
Dept. of the Navy	1	1	-[2]	-	-	-	-	-	-	-
Dept. of Transportation	1	-	-	1	19,538	13,036	13,036	-	-	-
Environmental Protection Agency	1	1	43,151	-	-	-	-	-	-	-
General Services Admin.	1	-	-	1	27,216	23,237	23,237	-	-	-
Immigration and Naturalization Service	3	1	8,648	2	321,825	314,680	314,078	-	602	-
Internal Revenue Service	11	5	264,270	6	77,813	57,685	51,319	-	-	6,366
Securities Exchange Comm	2	2	385,000	-	-	-	-	-	-	-
Small Business Admin.	2	2	4,740	-	-	-	-	-	-	-
Bankruptcy Courts										
Internal Revenue Service	1	-	-	1	1,694	900	900	-	-	-

[1] A = Attorney Fees
B = Study, Analysis, Engineering Report, Test, or Project
C = Expert Witness Fees
D = Other, including photocopying costs, telephone expenses, and transportation costs.

[2] Petitioner did not specify an amount in the request for attorney fees.

Although the total amount awarded increased 31 percent, the average amount awarded per case dropped from 8,537 in 1984 to 4,549 in 1985. This is primarily due to the large number of awards involving Social Security disability cases; most of which granted amounts of less than $3,000. The single largest award involved the Immigration and Naturalization Service (INS). In LaDuke v. Nelson, 560 F. Supp. (E.D. Wash. 1982), affirmed 762 F.2d 1318 (9th Cir. 1985), the court issued an injunction prohibiting the INS from conducting farm and ranch checks of migrant farm workers without a warrant, probable cause, or articulable suspicion, because of violations of Fourth Amendment rights. Subsequently, the court awarded $300,000 in attorney fees. Table 37 summarizes the number of awards and the total amount awarded against various Federal agencies, beginning with the largest total amount awarded.

Table 37
Awards Granted Under the Equal Access to Justice Act By Agency
During the Twelve Month Period Ended June 30, 1985

Agency	Number of Awards	Total Amount Awarded (Dollars)
Total	407	1,851,300
Dept. of Health & Human Services	373	950,631
Immigration and Naturalization Service	2	314,680
Dept. of Agriculture	6	176,304
Dept. of Interior	3	121,673
Dept. of the Army	3	109,291
Internal Revenue Service	7	58,565
General Services Administration	1	23,237
Dept. of Justice	4	20,106
Dept. of Housing & Urban Development	3	18,333
Dept. of Energy	1	18,100
Federal Energy Regulatory Commission	2	18,000
Dept. of Transportation	1	13,036
Dept. of the Navy	1	9,344

Of the 155 denied petitions, 65 percent (100) were denied because the court found the U.S. position "substantially justified." The Federal agencies in these cases were able to prove that their positions were reasonable in law and in fact. Twenty-four were denied because the petitioner was not found to be the prevailing party; 13 because the petition was not made in a timely fashion (either premature or too late); 7 because the court did not have jurisdiction to hear the request; 4 because the petitioner was financially ineligible; and 3 because the petitioner must file under another Federal fee-shifting statute. In the other four cases, the petitions were denied because special circumstances existed which made an award unjust. Two of the four were denied because the parties had agreed to settle the case with both parties paying their own attorney fees, while another was denied because the court felt an award would be contrary to the public interest. The fourth petition was denied because the court held that the Act does not apply to pro se representations.

51-916 O - 86 - 4

APPENDIX II (C)

EAJA Applications/Awards* - (October 1, 1981 - October 1, 1984)

Administration Proceeding		Court Proceedings	
applications	awards	applications	awards
FY 1982--103 filed	0 awards; 72 pending or stayed; of the 31 disposed of without an award 25 were by denial.	33 filed and closed	11 awards, totalling $700,338
FY 1983--88 filed of 10,000 adversary adjudications	8 proceedings, totalling $35,933.89; 53 applications were denied by agencies; over half (28) because agency's position was deemed substantially justified.	141 filed and closed	7 awards, totalling $1,770,857 (most are being appealed by U.S.)
FY 1984--143 filed	13 proceedings, totaling $121,943.79; 76 applications were denied or disposed of without an award. 139 applications were pending or stayed in FY 1984 or from earlier years.	277 filed and and closed	157 awards, totalling $1,270,682 (120 petitions were denied in FY 1984)
	TOTAL: $157,877.68**		$3,741,877**

*Data supplied by Administrative Office of the U.S. Courts and the Adminstration Conference of the U.S. in annual reports.

**Grand total = $3,899,754.68

APPENDIX II (D)

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-40342.4 October 5, 1984

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

We have just reviewed S. 919, 98th Congress, as reported by the Senate Judiciary Committee, and the accompanying report, Senate Report No. 98-586. The basic purpose of S. 919 is to make the Equal Access to Justice Act permanent. As we read the bill, the payment provisions would be consistent with the conclusions we reached in our decision 63 Comp. Gen. 260 (1984) (copy enclosed).1/

Since your Committee may soon have the occasion to consider this legislation, we are writing to express our concern with one provision of the reported version of S. 919, section 2(a)(7), which would add a new subsection (f) to 28 U.S.C. § 2412. The new 28 U.S.C. § 2412(f) would require the payment of interest on costs or attorney's fees awarded under 28 U.S.C. § 2412 which are not paid within 60 days after the date of the award. Since the proposed subsection (f) uses the words "pursuant to this section," it would presumably include those costs and fees awarded under 28 U.S.C. §§ 2412(a) and (b) which are payable, upon certification by the General Accounting Office, from the permanent appropriation established by 31 U.S.C. § 1304.

With respect to payments processed by this Office, which encompass the major portion of cost and fee awards against the United States, we are not aware of the need for this legislation. The Report, at pages 13 and 17, cites the Contract Disputes Act and the Prompt Payment Act as precedent. The Contract Disputes Act merely codified existing practice in that interest had been payable on contract claims for some time by virtue of a "Payment of Interest" clause included in most Government contracts. The Prompt Payment Act, as its

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1/ Senate Report No. 98-586, at pages 37 and 38, indicates that 5 U.S.C. § 504(c) and 28 U.S.C. § 2412(c) would be deleted. If this is in fact intended, the payment of awards under 28 U.S.C. § 2412(b) would be cast into doubt. We assume, however, that this is merely a clerical error and that S. 919 is intended to repeal merely the sunset provisions of the original law, sections 203(c) and 204(c) of Pub. L. No. 96-481.

legislative history makes clear, was the congressional response to a documented history of slow payment by many agencies. In contrast, costs and attorney's fees awarded by the courts are paid automatically and with reasonable promptness.

While we believe our record in processing these payments is good, it will be impossible in most cases to make payment within 60 days after the award, even if there is no appeal. First, the Justice Department must review the award and decide whether or not to appeal. The Report indicates that this is the basis of the 60-day "grace period." However, payment thereafter is not simply a matter of sending a voucher to a disbursing office. The necessary documents must be gathered and forwarded to our Claims Group for certification. As part of our certification process, we are charged by law with offsetting any known indebtedness by the judgment creditor to the Government. Our certification document (Certificate of Settlement) is then transmitted to the Treasury Department for issuance of the check. Given the best effort on everyone's part, payment within 60 days will be the clear exception.

The offsetting of indebtedness could also produce an anomalous situation. Suppose, for example, an attorney who has received a fee award also has an outstanding defaulted student loan. Under our offset authority (31 U.S.C. § 3728), we must first seek consent to the offset. Should the attorney delay in responding to us, interest under the proposed subsection (f) would continue to accrue on the fee award, making the resulting offset correspondingly meaningless. If the debt is relatively small compared to the fee award, considerations of cost effectiveness could prompt the Government to write off the debt, even in the face of a source of funds for potential offset. We think this result is undesirable and at odds with congressional emphasis in recent years on debt collection.

If the Congress should determine that interest on cost and fee awards is nevertheless desirable, the reported version of S. 919 would still introduce a number of inconsistencies into the law, and could result in giving preferential treatment to lawyers in many cases. The problems we perceive are summarized below:

(1) Interest on judgments against the United States has for some time been premised on an unsuccessful appeal by the Government and is not normally payable for brief processing delays. Existing law, revised as recently as 1982, is found in 28 U.S.C. §§ 1961 and 2516 and 31 U.S.C. § 1304.

Under section 2(a)(7) of S. 919, lawyers would receive more favorable treatment with respect to interest on their fee awards. (As discussed above, lawyers in many cases could also end up receiving more favorable treatment regarding offset of indebtedness.)

(2) The applicable rate of interest under S. 919 would be the rate established under section 12 of the Contract Disputes Act. The rate of interest on judgments generally is determined pursuant to 28 U.S.C. §§ 1961(a) and 2516(b) based on the equivalent coupon issue yield of 52-week Treasury bills. We see no reason to apply different rates of interest.

(3) Many fee awards against the Government are made under statutory authority which predated the original Equal Access to Justice Act. Frequently encountered examples are awards under the Freedom of Information Act and Title VII of the Civil Rights Act. As a matter of statutory construction, we assume these awards are not made "pursuant to this section [28 U.S.C. § 2412]" as that phrase is used in the proposed subsection (f). Thus, S. 919 could produce unequal treatment even as among fee awards.

(4) Interest under S. 919 would run through the date "payment is posted by certified or registered mail." Since the Government is a self-insurer, the Treasury Department does not normally use certified or registered mail in dispatching checks. Compliance with this aspect of S. 919 would thus increase processing costs to the Government.

For the reasons set forth above, and especially in view of current congressional concern over the budget deficit, we recommend that section 2(a)(7) of S. 919 be deleted pending fuller consideration. If interest is to be paid on cost and fee awards,[2/] we think it should be payable on the same basis as judgments generally. We further think this could be accomplished without the need for legislation. As far as we are concerned in the performance of our functions under 28 U.S.C. §§ 2414, 2517, and 31 U.S.C. § 1304, we would be guided by a clear statement of congressional intent in the legislative history with respect to the eligibility of fee awards under the existing interest statutes.

2/ Interest has traditionally not been payable on court costs. With respect to attorney's fees, the courts have not been uniform.

B-40342.4

We hope these comments are helpful. We are sending similar letters to Senator Thurmond, Chairman of the Senate Judiciary Committee, and Senator Grassley, Chairman of the Subcommittee on Administrative Practice and Procedure.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-40342.3 DATE: March 19, 1984

MATTER OF: Attorney fees--judicial awards under Equal Access to Justice Act

DIGEST: Permanent indefinite appropriation for judgments established by 31 U.S.C. § 1304 is available to pay attorney fees, except for "bad faith" cases, awarded under the authority of 28 U.S.C. § 2412(b), as long as award is final and payment is not otherwise provided for. However, judgment appropriation is not available to pay awards under 28 U.S.C. § 2412(d), nor "bad faith" awards under § 2412(b), both of which must be paid from agency appropriations.

This decision responds to a question that has arisen in a number of recent cases--whether the permanent indefinite appropriation for judgments (31 U.S.C. § 1304) is available to pay attorney fees awarded under the authority of 28 U.S.C. § 2412(b). As discussed below, except for awards based on a finding that the United States acted in bad faith, we believe it is.

A sample of the cases raising this issue is National Trust for Historic Preservation, et al., v. Corps of Engineers, 570 F. Supp. 465 (S.D. Ohio 1983). The plaintiffs in that case alleged that the Corps of Engineers violated Federal historic preservation statutes by issuing a permit to construct and maintain a barge loading facility on the Ohio River. The Court found that the Corps had violated the National Historic Preservation Act, and then awarded costs and attorney fees to the plaintiffs in the amount of $46,726.43. Under 16 U.S.C. § 470w-4 (1982), courts may award attorney fees in actions to enforce provisions of the National Historic Preservation Act:

> "In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable."

Background

Prior to 1981, the liability of the United States for attorney fees was governed by the so-called American Rule,

enunciated by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Under the American Rule, the prevailing party in litigation is not entitled to recover attorney fees unless provided for by statute. In the case of the United States, the American Rule was further reenforced by statute. 28 U.S.C. § 2412 (1976).

Over the years, Congress had dealt with fee-shifting on a piecemeal basis, and had enacted over 30 statutes expressly making the United States liable for attorney fees in specific contexts. Prominent examples are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). For convenience, we will refer to this category as "Group I." Under a Group I statute, the payment of judicial fee awards is governed by the statutes governing the payment of judgments against the United States generally, 28 U.S.C. §§ 2414 and 2517, and 31 U.S.C. § 1304. In brief, the awards, when final, are paid, upon certification by the General Accounting Office, from the permanent appropriation established by 31 U.S.C. § 1304 unless payment has been "otherwise provided for."

In addition to the Group I statutes, Congress has enacted several dozen other fee-shifting statutes which do not mention the United States or Federal agencies, and which therefore, under the doctrine of sovereign immunity, have been viewed for the most part as not authorizing fee awards against the United States. We will refer to these as "Group II." One such example is 16 U.S.C. § 470w-4, quoted above.1/

1/ We are aware that WATCH v. Harris, 535 F. Supp. 9 (D.Conn. 1981), relying heavily on legislative history, held that 16 U.S.C. § 470w-4 does authorize fee awards against Federal agencies. The Court went on to point out that, to the extent there may be any doubt, it was removed by the Equal Access to Justice Act, discussed in the text. We do not quarrel with that decision, and cite 16 U.S.C. § 470w-4 merely as an example of a fee-shifting statute which does not expressly mention the United States or Federal agencies. In any event, to the extent that 16 U.S.C. § 470w-4 may be viewed as independently authorizing fee awards against the United States without the need to rely on the Equal Access to Justice Act, it is clearly an exception to the "Group II" statutes.

The Equal Access to Justice Act

On October 21, 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, title II, 94 Stat. 2321, 2325, effective October 1, 1981. EAJA authorizes fee awards against the United States in a variety of administrative and judicial contexts in which they were not previously authorized. First, EAJA added a new 5 U.S.C. § 504, authorizing fee awards in certain administrative proceedings, specifically, adversary adjudications under the Administrative Procedure Act. Second, EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412.

As revised by EAJA, 28 U.S.C. § 2412 deals with judicial fee awards against the United States in two separate subsections, subsection (b) and subsection (d). Each subsection has its own payment provision.

Subsection (b) provides as follows:

> "Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States or any agency * * * in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."

The primary effect of subsection (b) is to authorize fee awards against the United States under the several dozen fee-shifting statutes which do not expressly mention the United States, i.e., the "Group II" statutes.[2/] The payment provision applicable to "subsection (b) awards" is subsection (c)(2):

2/ Subsection (b) also waives sovereign immunity under certain common-law exceptions to the American Rule--the "bad faith" exception and the "common fund" or "common benefit" exception. See S. Rep. No. 96-253, p. 3 (1979); H.R. Rep. No. 96-1418, p. 8 (1980). The "common fund" exception may present special problems and is not dealt with in this decision.

> "Any judgment against the United States or any agency * * * for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment."

Standing alone, subsection (c)(2) clearly contemplates payment from the judgment appropriation except in "bad faith" cases.

The second broad category of judicial fee awards authorized by EAJA is subsection (d)(1)(A) of the revised 28 U.S.C. § 2412:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and expenses * * * incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Subsection (d) goes on to prescribe eligibility requirements and application procedures, the details of which are not relevant here. The effect of subsection (d) is to authorize fee awards against the United States, as long as the "not substantially justified" test and the eligibility requirements are met, in cases where there was no pre-existing fee-shifting statute, that is, in cases where a fee award against a private litigant would not be authorized. The payment provision for "subsection (d) awards" is subsection (d)(4)(A):

> "Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title."

The subsection (d) payment provision is virtually identical to the payment provision for administrative awards. See 5 U.S.C. § 504(d)(1), 94 Stat. 2327. There is no need to attempt to determine when the judgment appropriation might be available under subsection (d)(4)(A), because EAJA § 207 provides that:

> "The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts."

Before proceeding with our discussion, another aspect of the EAJA must be noted. Subsection (d) and 5 U.S.C. § 504 are considered experimental and have a "sunset" date of October 1, 1984; they will be automatically repealed as of that date unless Congress enacts legislation to make them permanent. EAJA §§ 203(c) and 204(c), 94 Stat. 2327 and 2329. The sunset date does not apply to subsection (b), however, which will therefore remain as permanent legislation even if Congress takes no further action to retain the other provisions.

Awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412, subsection (d)

In a recent decision, 62 Comp. Gen. ____ (B-208637, September 29, 1983), we traced the legislative history of EAJA § 207 in detail, and considered its application to fee awards under 5 U.S.C. § 504 and subsection (d) of 28 U.S.C. § 2412. We pointed out that section 207 was inserted in response to a point of order which had been sustained based on the expansion of the availability of the permanent judgment appropriation. We concluded that section 207 prohibits use of the judgment appropriation to pay awards under either 5 U.S.C. § 504 or subsection (d) of 28 U.S.C. § 2412. We noted further that agency operating appropriations are available to pay these awards without the need for specific appropriations, unless prohibited by some other statute. We see no need to repeat that extensive discussion in this decision, and incorporate it here by reference.

Awards under 28 U.S.C. § 2412, subsection (b)

The real issue in this decision is whether our holding in B-208637, supra, applies as well to subsection (b) awards. Restated, the issue is whether section 207 prohibits use of the judgment appropriation to pay awards under subsection (b).

On the one hand, it is certainly possible to argue that section 207 applies to subsections (b) and (d) equally. It is not a part of either subsection, but is a separate provision applicable presumptively to the entire statute. As discussed in our September 1983 decision, the purpose of section 207 was to counteract a point of order based on the expansion of the availability of the judgment appropriation. Subsections (b) and (d) both purport to expand the availability of the judgment appropriation and thus, under this approach, would both be subject to section 207.

However, several factors suggest that section 207 was not intended to apply to subsection (b) awards.3/ First, former Representative Danielson's point of order, the sustaining of which gave rise to section 207, objected to:

> "[A]n amendment to the bill, a title II, which provides for the award of attorneys' fees and other expenses to the prevailing party other than the United States, in certain actions or administrative proceedings in which the judgment or adjudication has been adverse to the United States, unless the court or adjudicative officer of the agency finds that the position of the United States was substantially justified or that special circumstances make the award unjust."

126 Cong. Rec. 28638 (October 1, 1980). Since subsection (b) is not limited to parties "other than the United States," nor is it limited by the "substantially justified" test, Mr. Danielson seems clearly to have been alluding to subsection (d) and the proposed new 5 U.S.C. § 504, rather than subsection (b).

Second, the language of section 207 ("payment of judgments * * * in the same manner as the payment of final judgments as provided in this Act") is patterned after the payment

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3/ We have been provided with an opinion dated December 15, 1983, by the Office of Legal Counsel, Department of Justice, concluding that section 207 applies to subsection (d), but not to subsection (b), and that agency funds may not be used to pay subsection (b) awards except in "bad faith" cases. This decision is in essential agreement with that opinion.

provisions of subsection (d) and 5 U.S.C. § 504, rather than subsection (b). See 28 U.S.C. § 2412(d)(4)(A), quoted earlier in this decision, and the virtually identical 5 U.S.C. § 504(d)(1). Thus, it can be argued that the real concern of the Congress was over the experimental portions of the EAJA rather than subsection (b).

Finally, it is important to note that, although agency funds are available to pay subsection (d) awards, they are not available to pay subsection (b) awards. The payment provision for subsection (b), subsection (c)(2), quoted above, directs payment from the judgment appropriation except for bad faith cases. Except for the bad faith cases, there is nothing in the language or legislative history of the EAJA to suggest that agency funds are available for subsection (b) awards. Thus, if the judgment appropriation is not available, there would be no source of funds available for immediate payment of subsection (b) awards, and agencies would be required to seek specific congressional appropriations. While this factor is not controlling in and of itself, viewing it in conjunction with the points noted above, it does not strike us as unreasonable to construe section 207 as barring use of the judgment appropriation in situations where agency funds are legally available for payment, but as not precluding its use where agency funds are not available.

In sum, although we do not view the matter as entirely free from doubt, we conclude that the prohibition of section 207 need not be applied to subsection (b) awards, although it continues to apply to awards under subsection (d) and 5 U.S.C. § 504. Accordingly, we will treat fee awards in the future under the following guidelines:

(1) Awards under "Group I" statutes--fee-shifting statutes which applied to the United States before enactment of the EAJA--will continue to be paid from the permanent judgment appropriation unless otherwise provided for. The EAJA has no effect on payment under these statutes.

(2) Awards under "Group II" statutes--fee-shifting statutes which did not apply to the United States prior to EAJA but which now apply to the United States by virtue of subsection (b)--will also be paid from the judgment appropriation unless otherwise provided for. Payment requests in this category should cite as authority both subsection (b) and the specific underlying fee-shifting statute involved in that case.

B-40342.3

(3) Awards under subsection (d) and 5 U.S.C. § 504, as well as "bad faith" awards under subsection (b), will not be certified for payment from the judgment appropriation but must be paid from agency funds.

As a final note, in view of the October 1, 1984 sunset date for certain portions of the EAJA, it is likely that the Congress will be considering legislation in this area during the present session. We are therefore sending copies of this decision to the Senate and House Judiciary Committees for consideration in their deliberations as to precisely what form that legislation should take.

Milton J. Socolar

Acting Comptroller General
of the United States

APPENDIX II (E)

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

APR 30 1985

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
House Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased that you and Reps. Moorhead and Kindness have reintroduced a bill to reauthorize the Equal Access to Justice Act (H.R. 2223). As you know, this law is important to small business and I have long supported efforts to make the law a permanent regulatory reform.

Importantly, the bill addresses the major problem associated with efforts to reauthorize the EAJA last year, that is, the definition of the term "position of the United States". H.R. 2223 would define this term to mean both the position taken in the litigation and the agency action, or failure to act, upon which the civil action or agency adjudication is based. Thus, the agency action or failure to act that forms the basis of the litigation, can be evaluated by a court or adjudicative officer in deciding whether to award attorney's fees. The bill is a clear departure from the view, adopted by some courts, that the only government position to be scrutinized in a fee proceeding is that taken in the litigation itself.

At the same time, I believe this definition will wisely prevent an examination of agency conduct that is not the focus of the litigation.

In situations where a court or adjudicative officer does not hear the merits of the agency action because the case is settled or otherwise disposed of without a full trial, the agency action can easily be evaluated by reference to the pleadings, affidavits and other supporting documents filed by the parties in both the merits and fees case. Thus, the determination on the fees issue will be made without any additional need for discovery. Several courts have successfully followed this treatment of the "position" issue in these circumstances in the past. See, e.g. Del Mfg. Co. v. United States, No. 82-153, mem. op. (D.D.C. 1982), rev'd, 723 F.2d 980 (D.C. Cir. 1983); Britton v. United States, 587 F. Supp. 834 (W.D. Mo. 1984).

I believe this bill promotes the EAJA's goal of deterring unjustified agency actions, without unduly expanding a fee proceeding into irrelevant areas of agency conduct. I urge this bill's speedy approval.

Sincerely,

Frank S. Swain
Chief Counsel for Advocacy

APPENDIX II (F)

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Honorable Robert Kastenmeier
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
2137 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 2223, A Bill to Reenact the Equal Access to Justice Act

Dear Representative Kastenmeier:

The proposed legislation to reenact the Equal Access to Justice Act, H.R. 2223, represents a careful and constructive approach to this important issue. There is one technical problem, however, which I would like to bring to your attention. It relates to the award of fees in social security cases. I am submitting this statement in response to your request for our views on the reenactment of the EAJA. I would appreciate its inclusion in the hearing record.

The relevant amendment, found in section 3 of the bill, first clarifies that EAJA fees can be awarded in social security cases. This is a positive step forward which should eliminate the government's repeated, albeit unsuccessful, arguments to the contrary under the predecessor legislation.

However, the amendment runs into problems as it addresses the complicated question of how an EAJA award should mesh with a fee awarded under the Social Security Act's fee provision, 42 U.S.C. section 406.

By way of background, this provision of the Social Security Act permits an attorney to receive, upon order of the court, up to one-quarter of a successful claimant's past due benefits. This is the nature of a traditional contingent fee award and it should be emphasized that the fee is paid by the claimant and not by the government. The amendment in H.R. 2223 provides that an attorney cannot receive both EAJA fees and section 406(b) fees for the same work and, upon an EAJA award, must refund the section 406 fees to the claimant. While its intent to eliminate "double-dipping" is quite appropriate, H.R. 2223 ignores the fact that, because they are calculated differently, section 406(b) fees can often exceed EAJA fees. If the proposed provision becomes law, attorneys will simply not apply for EAJA fees where they would be lower than the section 406(b) fees. This will be to the substantial detriment of the claimant who will thus have to bear the entire cost of fees and will be denied the benefit intended under EAJA.

In my view, there is a middle ground which would eliminate double-dipping but would also eliminate this disincentive to seek fees under EAJA. Under this approach, the attorney could receive no more than the greater of either the EAJA or section 406(b) fee and would have to return to the claimant the value of the smaller award. This, in fact, was the approach taken in the House Report accompanying H.R. 5479, H.R. Report 98-992, 98th Cong. 2d Sess. (1984) at p. 13.

Let me offer an example. Assume an attorney successfully represents a claimant and obtains for that claimant a past-due benefit of $12,000. Under section 406(b) the attorney would be entitled to a $3,000 fee. Assume further that the attorney spent 25 hours on the case. Under EAJA, the maximum fee allowable would be $1,875 or $1,125 less than the section 406(b) fee. Under the proposed amendment, the attorney would have to return the section 406(b) fee upon award of the EAJA fee. The resulting disincentive to pursue an EAJA fee becomes quite clear. Under our proposal, the attorney would keep an aggregate $3,000 fee but the claimant would receive the value of the smaller award of $1,875. As a result, the claimant would only be liable for the difference between the EAJA fee and the section 406(b) fee of $1,125 instead of the entire section 406(b) fee of $3,000.

Conversely, let us assume the same hours and EAJA fee but a past-due award of only $6,000 with a section 406(b) award of $1,500. The attorney would keep the EAJA fee and return the section 406(b) fee to the claimant.

The following statutory language will accomplish this goal:

> Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) and section 2412(d) of Title 28, United States Code, the claimant's attorney refunds to the claimant the value of the smaller fee.

An alternative approach would be to delete any statutory language regarding this subject and include in the Committee report the same langugage that was included in last year's report:

> It is the Committee's intent that when fee awards are made in Social Security or SSI cases under the Equal Access to Justice Act (EAJA), and provision is also allowed under the Social Security Act for recovery of attorneys fees of up to 25 percent of the claimants' benefits, that the EAJA award should

be used as a set-off to reduce the payment which the claimant would otherwise owe the attorney.

This would accomplish the same goal.

I appreciate your consideration of our views and would be pleased to be of any further assistance on this matter.

Sincerely,

Ellen J. Vargyas

Ellen J. Vargyas

APPENDIX II (G)

COMMENTS OF PHILIP P. FRIEDLANDER, JR.

EXECUTIVE VICE PRESIDENT

NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION

on

EQUAL ACCESS TO JUSTICE

submitted to

COMMITTEE ON COURTS, CIVIL LIBERTIES & THE ADMINISTRATION OF JUSTICE

of the

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

April 30, 1985

Mr. Chairman, my name is Philip P. Friedlander, Jr., I am the Executive Vice President of the National Tire Dealers and Retreaders Association (NTDRA), a national nonprofit trade association representing approximately 5,000 independent tire dealers and retreaders located in 50 states who are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires, and the sale of related products and services.

I very much appreciate, Mr. Chairman, the opportunity to testify in support of HR.2223, the bill which you introduced on April 25th known as the "Equal Access to Justice Amendments." In the view of NTDRA, there is a clear and pressing need to permanently reauthorize this law which provides for the award of attorneys' fees to individuals and small businesses or organizations who prevail in a legal action against the government where the government is unable to prove that its conduct is substantially justified.

Prior to the original passage of the Equal Access to Justice Act in 1980, each party in litigation involving the government was largely responsible for the payment of his own attorneys' fees and legal costs incurred during litigation. This standard American court practice is grounded upon the belief that a losing

party should not be penalized for merely exercising his legal right to prosecute or defend a lawsuit.

However, as has been widely recognized, and further underscored by the legislative history of the Equal Access to Justice Act, not all citizens can afford the costs of vindication of their rights when the bottomless pocket of "Uncle Sam" is brought to bear in the courtroom. Indeed, without the Equal Access to Jus tice Act many citizens are financially barred from admission to the adjudicatory process, given the further prospect of lenghtly and costly appeals by the government! For example, when the costs of contesting a government order exceeds the amount at stake, it logically becomes more practical to endure an injustice than to seek to rectify it.

NTDRA, therefore, supports the premise, earlier acknowledged in Congress, that a party who chooses to litigate an issue against the government is participating in the refining of public policy. Such an adjudication may reveal the shortcomings of an existing federal regulation, thereby leading to a positive change, or may provide the impetus for formulating more precise rules. Consequently, when parties are thus serving a public purpose, it is unfair to expect them to finance by their tax dollars unreasonable government action while also bearing the burden of vindicating their rights.

Since the original enactment of the Equal Access to Justice Act, fears of excessive costs associated with this legislation have proven unfounded. As revealed by the Administrative Office of the U.S. Courts, a total of $2.47 million was paid out during F.Y. 1982 and 1983 in 64 court cases. In fiscal 1983, an approximate total of $36,000 was awarded in 8 administrative proceedings. Such outlays, in the view of NTDRA, cannot be considered excessive against the benefits described above.

The importance of the Equal Access to Justice Act to the small business community cannot be over-emphasized to this subcommittee, Mr. Chairman. One need not have a long memory to recall numerous incidents whereby a small business operator has been confronted by the 'faceless' bureaucrat. The bureaucrat insists upon taking an overly broad interpretation of the regulation to be enforced. He threatens the small businessman with a cite--unless compliance is forthcoming. The small businessman, in turn, asks his attorney what to do. The attorney responds: yes, you are on firm legal ground; the government regulation certainly is being interpreted more broadly than intended. However . . . . the high cost to you of WINNING in court cannot be justified. It is far cheaper for you to capitulate, and comply with the bureaucrat's subjective interpretation.

As the situation just described amply demonstrates, the

Equal Access to Justice Act is not simply a piece of luxury legislation. It forms a frontline defense against over-zealous bureaucratic abuse, which, on more than one occasion, has stifled unjustly the business endeavors of this vital component of our economy. The small business community, of which NTDRA's members are a part, needs more than the customary recognition by members of Congress of the importance of small business to the free enterprise system--it needs the PROTECTION afforded by Equal Access to Justice Act legislation!

In conclusion, Mr. Chairman, NTDRA commends you for introducing HR.2223, and goes on record as supporting wholeheartedly the spirit of this legislation.

Thank you, Mr. Chairman.

APPENDIX II (H)

JAMES R. JONES, OKLAHOMA, CHAIRMAN
SUBCOMMITTEE ON SOCIAL SECURITY

ANDY JACOBS, JR., INDIANA
RICHARD A. GEPHARDT, MISSOURI
WYCHE FOWLER, JR., GEORGIA
BRIAN J. DONNELLY, MASSACHUSETTS
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SAM M. GIBBONS, FLORIDA

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HAL DAUB, NEBRASKA
JUDD GREGG, NEW HAMPSHIRE

Ex Officio
DAN ROSTENKOWSKI, ILLINOIS
JOHN J. DUNCAN, TENNESSEE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515
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DAN ROSTENKOWSKI, ILLINOIS, CHAIRMAN
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JOSEPH K. DOWLEY, CHIEF COUNSEL
A.L. SINGLETON, MINORITY CHIEF OF STAFF

IRWIN HYTHER, SUBCOMMITTEE STAFF DIRECTOR

May 1, 1985

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

I want to thank you for your March 30 letter enclosing that of your constituent, Mr. of Madison, Wisconsin regarding the possible changes in the method of paying attorney's fees in social security disability cases. I apologize for the delay in getting back to you on this matter.

As you know, the Social Security Disability Reform Amendments of 1984 provide for payment of benefits to claimants appealing the termination of their eligibility through the administrative law judge appeals level. This continuous payment of benefits will result in a lower lump sum benefit payment to beneficiaries who win their appeals, from which attorneys' fees are usually calculated. Thus, the amount of the fee award in all disability cases in the future will be very small, and may result in substantial disincentives for attorneys to take these cases. Mr. raises the issue of whether these fee awards should not be based on the amount of future benefits the client can expect to receive, should the case be successful.

Social security beneficiaries are entitled to attorneys in order to pursue their claims through the administrative process, and the current law provides for collection of attorneys' fees from claimants through the benefit payment system, in order to assure reasonable access to professional legal assistance. However, the administrative hearing process in social security has never been an adversary proceeding, in which attorneys representing each side contest the issue, and a third party judge decides the outcome. The process is supposed to be one which any citizen can receive a fair review of his or her claim, based only on the factual dispute, and receive an objective decision on the merits from Social Security Administration examiners and administrative law judges who have no interest in either terminating or preserving benefits for any particular beneficiary.

The use of attorneys has greatly increased over the last five years because of the turmoil in the disability program and the widespread view that it was impossible to receive an objective review of claims at the administrative level, and that beneficiaries were losing their benefits simply because they didn't know how to plead their cases persuasively enough. This is not a desirable pattern for a program that has one of the highest volume administrative review processes in the world. The introduction of expensive and time-consuming litigation practices into such a review system would result in long delays in processing claims and greatly increase the expense of the system to both the government and to beneficiaries. One goal of the 1984 Amendments was to clarify eligibility standards, and make those standards publicly available, so that professional assistance would not be necessary for beneficiaries in the appeals process.

It is true that the Equal Access to Justice Act has been extended to cover the five adversarial hearing experiments that SSA is currently undertaking, in which the government is represented at the ALJ hearing. The rationale for that extension was that, since the government was formally represented, claimants should not be unrepresented, and in such a setting, government payment for attorneys was appropriate. This rationale does not extend to the hearing process in general, either for initial applicants or for the beneficiaries appealing termination of benefits, because the process itself is not adversarial. Therefore, at this time, there does not seem to be a persuasive case for extending the EAJA to all administrative hearings under social security.

However, I can assure you that this issue is of considerable concern to the Subcommittee, and that as part of our hearings this summer on the implementation bill, I plan to ask for testimony on the problem of attorneys' fees, and the broader issue of attorney participation in the administrative hearing process. We will be paying particular attention to the possible plans of the Administration to expand the adversarial hearing experiment, and the question that experiment raises about expansion of the coverage of the Equal Access to Justice Act to all such hearings.

I hope that this information is helpful, and am taking the liberty of placing your letter in the legislative file of the Subcommittee, so that other members can have the benefit of the views expressed. Thank you again for sharing it with me.

With every good wish, I am

Sincerely yours,

JAMES R. JONES
Chairman

APPENDIX II (I)

Chamber of Commerce of the United States of America

Washington

STATEMENT
on
THE EQUAL ACCESS TO JUSTICE ACT REAUTHORIZATION
for submission to the
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE
of the
HOUSE COMMITTEE ON THE JUDICIARY
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
RAYMOND S. WITTIG*
MAY 9, 1985

I am Raymond S. Wittig, a member of the Council of Small Business at the Chamber of Commerce of the United States.

Thank you for allowing the Chamber of Commerce of the United States to present these remarks on H.R. 2223, a bill to reauthorize the Equal Access to Justice Act.

The concept of the Equal Access to Justice Act was a recommendation of the 1980 White House Conference on Small Business. It is very important legislation for our more than 160,000 small business members. The Chamber is pleased to support fully this legislation.

As the former Minority Counsel for the House Small Business Committee, an attorney in private practice, and a member of the Chamber's Council of Small Business, I have been involved actively in this issue for over five years. You and the other members of the Subcommittee should be congratulated for your support of the original legislation (P.L. 96-481) and your perseverance and persistence in this reauthorization effort.

H.R. 2223 has received the endorsement of the entire small business community, the Alliance for Justice (a national association of public interest legal organizations), and the Department of Justice. Action must be taken quickly to reauthorize this legislation--legislation which provides relief to businesses and individuals who are subject to government actions that are not "substantially justified." If this legislation is not enacted quickly, the pending legal actions will continue to increase, and congressional intent will not be served.

H.R. 2223 specifically addresses the concerns raised by the President in his veto message of the original reauthorization legislation (Memorandum of Disapproval of November 9, 1984, vetoing H.R. 5479). The small business community and the public interest groups involved in this issue have extended themselves to the fullest to satisfy the President's concerns regarding the

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* Of Counsel, Lipsen, Hamberger, Whitten, and Hamberger; Member, Council of Small Business, Chamber of Commerce of the United States; formerly Minority Counsel, U.S. House of Representatives Committee on Small Business.

term "position of the United States," the extent of allowable discovery in determining fee awards, and the interest determinations. These good faith efforts in addressing the President's concerns should be noted.

The new statutory language concerning these issues also should be clarified fully in the report which will accompany this legislation. Careful drafting of report language to show clear meaning and intent of the Committee and the Congress is necessary to reduce, to the maximum extent possible, multiple interpretations by federal agencies and courts. The alternative judicial interpretations of the Equal Access to Justice Act clearly indicate why a precise statement of intent is necessary.

Again, I thank you for allowing me to present the views of the Chamber of Commerce of the United States on this important legislation.

APPENDIX II (J)

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 14 1985

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The House Judiciary Committee will shortly be taking up H.R. 2223, a bill to reauthorize the Equal Access to Justice Act. On behalf of the Administration, I want to express our strong support for this bill as reported by the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and urge you to support the bill and to resist additional amendments.

The bill is a delicately balanced compromise between various parties, including the Administration, with strong views on many of the issues dealt with in the bill. Any amendments risk upsetting that balance and, therefore, put in jeopardy the reauthorization of the program.

We are particularly concerned with an amendment dealing with remands in social security cases, which was defeated in subcommittee, as well as two amendments which apparently were drafted, but were not offered in subcommittee. The first of these two would have extended the Equal Access to Justice Act to social security administrative proceedings. The second amendment would have permitted new discovery into the substantial justification question in EAJA cases. The Administration strongly opposes all of these amendments.

The first amendment, to automatically treat a party who obtains a remand in a social security case as a prevailing party eligible for fees, ignores the nature of a remand in a case. Cases are remanded by the courts to the Social Security Administration for a variety of reasons, with varying effects on the final result. In many cases a remand may not be the final decision in the case, but merely another procedural step that does not determine the result in the case.

The second amendment, which would extend the Equal Access to Justice Act to social security administrative proceedings, would change what is now a nonadversarial proceeding, where the

government is not represented by counsel, to an adversarial proceeding where the government would be obligated to insure that its view was represented. The result would be increased workloads and administrative expenses for the Social Security Administration and more complicated administrative proceedings. The social security system is working hard to adapt to the changes in the disability programs made by Congress in the last session. We believe these changes resolved most of the problems that concerned all of us about the disability program. This is not the time for such a major change in agency procedures.

The last amendment, to permit discovery in the course of the court's inquiry into whether the position of the United States was substantially justified, would upset the balance struck in H.R. 2223. One of the Administration's primary concerns with the bill passed last year was the potential for additional discovery and evidentiary proceedings relating to agency activity which had nothing to do with the agency action which formed the basis of the lawsuit. We believe H.R. 2223 as reported by the Courts Subcommittee answers this concern. Adoption of an amendment on this central issue would be directly contrary to the agreement reached in H.R. 2223.

We support the swift passage of H.R. 2223 as reported by the Courts Subcommittee.

The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Phillip D. Brady

Phillip D. Brady
Acting Assistant Attorney General